292 A

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46017

SAM SCHAFFER, Appellant, v. PARK CITY BOWL, INC., an Illinois corporation, Appellee.	APPEAL FROM COUNTY COURT, COOK COUNTY.

MR. PRESIDING JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Plaintiff brings this action upon a written contract of employment, commencing September 1, 1949, and terminating August 31, 1951. A trial without a jury resulted in a finding for defendant, upon which finding judgment was entered. Plaintiff appeals from the judgment.

Upon a prior appeal (345 Ill. App. 279), we reversed the finding and judgment in favor of defendant, principally upon the ground that defendant was shown to have had knowledge of the alleged misconduct of plaintiff as manager and, after warning him against repetition of such conduct, continued him in his employment until his discharge; and that defendant did not sustain the burden of showing that the alleged misconduct continued up to the time of the discharge, to overcome the doctrine of condonation of his conduct after they had first learned of it. We also held certain documentary evidence to be incompetent and inadmissible.

Plaintiff now complains that there is no competent evidence to sustain the judgment, and that the court considered incompetent evidence.

The present record reveals sufficient evidence to prove that plaintiff's misconduct as manager continued up to approximately the time of his dismissal, and that his conduct was not condoned by defendant.

The evidence claimed to be incompetent referred to a petition signed by a number of the patrons, complaining of plaintiff's conduct as manager, which was discussed in our prior opinion. The petition was not received in evidence upon the retrial. The references made to that petition by some of the witnesses for defendant were in conversations with plaintiff. It proved notice to him of existing complaints by patrons. Those conversations were competent. The court heard and saw the witnesses, and we are satisfied that the evidence sustains the judgment.

The judgment is affirmed.

AFFIRMED.

KILEY AND LEWE, JJ. CONCUR.

293 A

46260

WALTER J. TURNER and GEORGE L. GOOGE, individually and as Vice Presidents and members of the Board of Directors and as representatives of the members of the International Printing Pressmen & Assistants' Union of North America, an unincorporated association, and PETER PERRIGO, a member of said International Printing Pressmen & Assistants' Union of North America, Appellees, v. WALTER A. REBENSON, WILLIAM R. KENNY, JOSEPH NELLIGAN and JOSEPH GAVIN, individually and as representatives of an unincorporated association known as Printing Specialties & Paper Products Union No. 415. Appellants. INTERNATIONAL PRINTING PRESSMEN & ASSISTANTS UNION OF NORTH AMERICA, Defendant - Appellee.	1 I.A.2d 85 INTERLOCUTORY APPEAL FROM SUPERIOR COURT, COOK COUNTY.

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

Defendants appeal from an order granting a temporary injunction restraining defendants, the representatives and members of a labor union, from using the name "Printing Specialties & Paper Products Union No. 415."

The record shows that a similar complaint was filed by plaintiffs against substantially the same parties in the Superior and Circuit courts of Cook County. The pleadings in both of these cases are recited in detail in the recent case of International Printing Union v. Rebenson,

350 Ill. App. 156, where this court held that the prior suit instituted in the Superior Court between the parties abated the suit filed later in the Circuit Court.

In the case last cited our opinion was filed on April 29, 1953. July 7, 1953 defendants filed an amendment to their complaint in the Circuit Court, which alleges substantially as follows:

About September 9, 1937 the International Printing Pressmen & Assistants' Union of North America, hereinafter called the "International," granted a charter to Chicago Paper & Box Workers' Union No. 415. From October 1937 to September 1951 the International and Chicago Paper & Box Workers Union Local 415 acted as representatives of the members of the Paper & Box Workers Union Local, negotiating collective bargaining agreements and other terms and conditions of employment with the employers of the members of the Local.

In May 1949 the International adopted a uniform designation for its local constituent union. June 15, 1949 the members of the Chicago Paper & Box Workers Union No. 415 adopted the designation promulgated by the International and thereafter became known as "Printing Specialties & Paper Products Union No. 415," hereinafter called Local 415.

September 19, 1951 defendants Rebenson and Kenny called a Local meeting attended by alleged members of Local 415, at which time Kenny and Rebenson caused a "purported" disaffiliation of Local 415 from the International, and organized a "purported" independent local union and continued to use the same name, as Local 415.

C

In December 1952 defendants individually and as representatives of Local No. 415, caused the affiliation of Local 415 to be made with the International Brotherhood of Pulp, Sulphide and Paper Mill Workers of the United States, Canada and Newfoundland, a rival of the International. Thereafter Local 415 continued to use the same name it had theretofore when it was affiliated with the International but carried on its activities in opposition to the International.

Since June 1949 the International had expended large sums of money organizing employees for Local 415 and making the name of Local 415 known among employees and employers in the printing specialties, paper box and converting industries in the City of Chicago and vicinity and to the public in that area. Plaintiffs claim they are entitled to the exclusive use of the name of Local 415 and that the defendants' use of the name has tended to mislead the public generally and also the employees and employers engaged in the printing specialties, paper products and converting industries in the City of Chicago and vicinity.

In its concluding paragraphs the amendment prays for a judgment declaring that plaintiffs are entitled to the exclusive use of the name of Local 415; that a temporary injunction be issued enjoining defendants from using the name; that the injunction be made permanent upon a final hearing; and for general relief.

The record shows that the temporary injunction was granted on the allegations of the amendment to the complaint.

Defendants contend that the temporary injunction did not maintain the status quo. The law seems well established that an interlocutory injunction is merely provisional in its nature and does not conclude a right. Its effect, and purpose is to keep matters in status quo until the hearing or further order of the court. (Nestor Johnson Mfg. Co. v. Goldblatt, 371 Ill. 570.) In defining the term "status quo" this court in Northern Illinois Coal Corp. v. Langmeyer, 340 Ill. App., 423, 429, said, "The status quo which will be preserved by a preliminary injunction is the last actual possible noncontested status which preceded the pending controversy," citing 43 CJS 428.

The last actual noncontested condition which preceded the present controversy was that which existed August 15, 1951 when the present suit was filed. According to the allegations of the amendment to the complaint, the designation "Local 415" was adopted and used by defendants since June 1949.

Under these circumstances we think the temporary injunction did not preserve the status quo as defined in the case last cited but, on the contrary, it disturbed a status which had existed without interruption for more than two years before the temporary injunction was issued. Moreover, the allegations of the complaint show that the primary purpose of the instant suit is to deprive Local 415 of the name and, since the order here appealed from in effect grants the ultimate relief asked for in the amended complaint,

it is not interlocutory. See Levy v. Rosen, 258 Ill. App. 262; and Cleaning and Dyeing Plant Owners Association of Chicago v. Sterling Cleaners and Dyers, Inc., 278 Ill. App. 70.

The temporary injunction was improvidently issued and in the view we take of this case it is unnecessary to determine the other issues raised. For the reasons given, the order granting a temporary injunction is reversed.

ORDER GRANTING TEMPORARY
INJUNCTION REVERSED.

FEINBERG, P.J. AND KILEY, J., CONCUR.

294 A

1 I.A 2d 86

46285

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,	)	ERROR TO
v.	)	COUNTY COURT,
IRA G. BROWN, Plaintiff in Error.	)	COOK COUNTY

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

Defendant Ira G. Brown was found guilty by a jury of violating Section 24 of the Medical Practice Act (Ill. Rev. Stats. 1949, ch. 91, ~~para. 161~~ § 161) and was sentenced on each of five counts of the Information to a term of six months in jail with sentences to run concurrently, and was also fined $200 on each count. Defendant appealed directly to the Supreme Court, where the cause was transferred to this court on the ground that no constitutional question was presented (415 Ill. 626).

In addition to other acts of unlawful conduct, all of the counts of the Information charged defendant with treating human ailments without a valid license issued by the State of Illinois. The first count alleged that defendant did "diagnosticate the supposed ailment of Frances Dickerson as a misplaced vertebra." The second count alleged that the defendant prescribed an X-ray picture and that he unlawfully treated Frances Dickerson by manipulating and applying pressure to her spine and back with his hands. Count three charged that the defendant

Ill. Stat. Ann. 79.25

unlawfully prescribed an X-ray picture and applied pressure with the hands on the spine of Frances Dickerson for the relief and cure of a supposed ailment with the intention of receiving a fee. Count four alleged that defendant unlawfully attached the title of "chiropractor" to his name on the window of his office, and Count five alleged that the defendant unlawfully maintained an office for examination and treatment of persons "afflicted or supposed to be afflicted" with an ailment.

Defendant contends that the court erred in denying defendant's motion to quash the Information for the reason that the information does not state every element of which the offense consisted. We think this contention is without merit. Although the charges are mainly in the language of the statute each count of the Information describes particular acts with reasonable certainty. In the recent case of People v. Gholson, 343 Ill. App. 276, where substantially the same charges were made in similar language as in the present case, we held that the indictment consisting of five counts was sufficiently definite and certain.

In the instant case the material facts are substantially uncontroverted. Frances Dickerson, an Investigator of the Department of Registration and Education of the State of Illinois, called at the offices of defendant. On the office door, among other names, she saw that of the defendant "Ira G. Brown, Palmer Chiropractor."

After a short period of waiting in a large room defendant took her into his office in the rear of the building where he asked the witness what ailed her. She told defendant that she had a pain between her shoulder blades for about a month. At the defendant's direction the witness went into a small room containing a chiropractor's table and lay on her abdomen while defendant applied pressure "from the end of my spine to the end of my skull." The witness was then told to lie on her back and while in this position defendant turned her head to the right and left causing it to make "a snapping noise." Defendant told the witness that "it seemed to him the trouble was in vertebrae number one and two around the cervical area." She paid defendant seven dollars for which she received a receipt and was requested to return "in a couple of days to take more treatment."

Defendant testified that he gave the witness a manipulative massage using his own technique developed over the years; that he had conducted his business in the same place where he has resided for the past twenty-six years.

On cross-examination the State's witness Dickerson admitted that she did not know how or when the sign was placed on the windows of the defendant's office as alleged in Count 4 of the Information. This testimony defendant contends should have been excluded because

it contradicts the allegations of Count 4. In our view the testimony complained of does not contradict the allegations of the Information. Defendant admitted that he conducted his business on the premises where the sign bearing his name followed by the words "Palmer Chiropractor" was located and that he had occupied the premises for a long period of time. From defendant's own admissions we think the jury could find that the sign in controversy was placed on the windows at the direction of the defendant.

From a careful reading of the record we think that the evidence is ample to support the verdict of the jury on each count of the Information and that the defendant has had a fair and impartial trial.

For the reasons given, the judgment is affirmed.

JUDGMENT AFFIRMED.

FEINBERG, P.J., and KILEY, J., CONCUR.

301 A

1 Ill.2d 87

46101

JAMES BROOKS, Appellee,	)	APPEAL FROM CIRCUIT COURT,
v.	)	COOK COUNTY.
MAHALIA BROOKS, Appellant.	)	

MR. JUSTICE ROBSON DELIVERED THE OPINION OF THE COURT.

This is an action for divorce by the plaintiff, James Brooks, against his wife, the defendant, Mahalia Brooks, on the ground of adultery. The case was heard by the chancellor and after a full hearing he entered a decree in favor of the plaintiff.

The principal contention of the defendant is that the findings and decree of the trial court are contrary to and not supported by the evidence. The facts reveal that the plaintiff and defendant were married on September 2, 1943, in Arkansas. At the time of the alleged misconduct of the defendant they had been residents of Cook County, Illinois, for over one year. Plaintiff was a soldier in the United States Army. He was stationed at Camp Breckenridge, Kentucky, some 300 miles from Chicago. Defendant was living in an apartment in Chicago with her mother, her brother and the brother's son. Plaintiff testified that on June 26, 1952, in company with another soldier from Camp Breckenridge by the name of Hoskins, he drove to the apartment in which the defendant was living. He arrived at the apartment at about eight o'clock P.M. He entered the kitchen and,

finding no one there, proceeded to his wife's bedroom at the front of the apartment. The door was closed. He opened it and found the defendant in bed with a man he called Edwards, whose full name was Edward King, and whom he had seen at the apartment on the occasions of his previous visits. Defendant was wearing a low-cut nightgown and Edwards was nude from the waist up. He asked the man what he was doing in bed with his wife. He failed to answer. Hoskins, who was with him, urged him to leave and not start trouble. He followed Hoskins' advice and left. Plaintiff's testimony was corroborated by Hoskins.

Defendant denied that the plaintiff came to the apartment on June 26 but stated that it was on the 28th; that the other members of her family who resided in the same apartment were present; and that Edward King was also there but sitting in the living room with the rest of the members of the family. Defendant denied that she at any time had sexual relations with King. She stated that on the date of the 28th when plaintiff came home she told him that she had been to a doctor on June 27 for the treatment of a fibroid tumer of the uterus. He remained at the apartment a short time. He left, saying he was going to the "Y" to take a bath, and did not return. Defendant's version was substantially corroborated by her mother, brother and Edward King. King also denied ever having had any sexual relations with the defendant. Dr. Leo Goldman testified that he had examined the defendant

on June 27 and found that she had a fibroid tumor of the uterus and was bleeding. He stated he did not know what her condition was on the 26th, the date of the alleged act of adultery, and that the condition wouldn't prevent her from performing her usual duties. No statement was made by Goldman as to whether the tumor would affect defendant's ability to have sexual intercourse.

It is apparent from this summary of the testimony that there was a sharp conflict as to the facts. It has been repeatedly held that a reviewing court is not justified in reversing the decree of the trial court when it is dependent upon the weight and credibility to be given to the testimony of the parties unless the decree is manifestly against the weight of the evidence. Blake v. Blake, 70 Ill. 618, 622; Cooke v. Cooke, 152 Ill. 286, 290; Ryan v. Ryan, 321 Ill. App. 467, 470; Podgornik v. Podgornik, 392 Ill. 124, 125-6; Marcy v. Marcy, 400 Ill. 152, 156-8; Mason v. Mason, 342 Ill. App. 140, 143; Bogaerts v. Bogaerts, 344 Ill. App. 497, 499.

It is seldom that adultery, such as is charged here, is established by direct or positive evidence and as a general rule resort must be had to circumstantial evidence. Cooke v. Cooke, 152 Ill. 286, 290; Marcy v. Marcy, 400 Ill. 152, 156.

Plaintiff testified that he found defendant in bed with another man who was nude to the waist. He could not see below the waist because the man had covers over him.

Defendant was in bed with this man in a low-cut nightgown. These facts and circumstances if believed by the trial court, fairly and reasonably led to the conclusion that adultery had been committed. Best v. Best, 82 Ill. 584, 585; Cooke v. Cooke, 152 Ill. 286, 290. Marcy v. Marcy, 400 Ill. 152, 156.

The trial court heard and saw the witnesses. It believed the testimony of the plaintiff. Under these circumstances we cannot say that its decision in finding for the plaintiff was against the manifest weight of the evidence. The decree of the trial court is affirmed.

Decree affirmed.

Schwartz, P.J., and Tuohy, J., concur.

300 A

46088

MARY M. DIVER, now known as MARY M. VANDER VRIES, Appellee,	)	APPEAL FROM SUPERIOR COURT, COOK COUNTY.
v.	)	
WILLIAM R. DIVER, Appellant.	)	

1 I.A.2d 87

MR. JUSTICE TUOHY DELIVERED THE OPINION OF THE COURT.

On August 25, 1950 a decree of divorce was entered on petition of plaintiff Mary M. Diver, William R. Diver being the defendant. Among other provisions of the decree was one that the husband pay the sum of $25 per month for the support and maintenance of each of the couple's two minor children, then aged 7 and 2-1/2 years respectively. Subsequently, on August 18, 1952, a petition for modification of the decree was filed on behalf of the plaintiff alleging that the sum of $50 for the support of the children was inadequate and insufficient to provide for the care of the children because of the increase in the cost of living and the increased expenses by virtue of the advancing age of the children. It was alleged that the defendant was earning the sum of $12,000 per annum. The petition prayed the allowance of attorney's fees. Defendant answered alleging his income to be $7,942 a year and that no change had occurred in the defendant's financial condition to warrant any increase in allowance. Having heard evidence, the trial court modified the decree by increasing the

support from $50 to $140 per month and allowing plaintiff counsel fees in the sum of $300.

The evidence indicates that at the time of the entry of the divorce decree plaintiff contemplated return to her parents' home in New Jersey where she would be under no obligation to pay for food or lodging for the children, and consequently accepted the inadequate amount of $50 per month support for the two minor children. Since then plaintiff has remarried, has left her parents' home and has become the sole support of the children. Furthermore, the children are two years older than at the time the decree was entered, and the trial court took into consideration the increased expenditures in view of the advance in age. There is also evidence tending to prove that defendant's income has increased from $7,000 annually to $7,963, approximately a $1,000 increase. The evidence indicates that he is a single man with no other dependents.

Under all the facts and circumstances we are not disposed to interfere with the judgment of the trial court either as to the increase in support or the allowance for attorney's fees. Accordingly the order of the Superior Court of Cook County appealed from is affirmed.

Order affirmed.

Schwartz, P. J., and Robson, J., concur.

286 A

46066

WESLEY M. CLEVELAND and IRMA CLEVELAND, Appellees,	)	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
v.	)	
JEFFERSON ICE COMPANY, a corporation, Appellant.	)	

MR. JUSTICE TUOHY DELIVERED THE OPINION OF THE COURT.

Plaintiffs sued defendant for damages arising out of a collision between a passenger automobile driven by plaintiff Wesley Cleveland and owned by his wife, Irma Cleveland, and a truck owned by defendant and driven by its agent. Originally two suits were filed, one by plaintiff Wesley for personal injuries and the other by plaintiff Irma for property damage and for rental of a replacement car during the period her automobile was undergoing repairs. The cases were consolidated and heard by the court without a jury. The court found the issues for the plaintiffs and entered judgments in favor of plaintiff Wesley Cleveland and against the defendant in the sum of $342.19 and in favor of plaintiff Irma Cleveland and against defendant for $630.61.

The accident occurred on November 5, 1951 at the intersection of Granville avenue and Brophy avenue, in Park Ridge, Illinois, at about 12:00 noon. The car driven by plaintiff Wesley Cleveland was westbound on Granville avenue and the truck driven by defendant's agent was

southbound on Brophy street. The collision occurred in the intersection, after the passenger car had crossed the center line of the intersection. Plaintiff Wesley Cleveland and defendant's agent were the only eyewitnesses to the collision, and there is considerable material conflict in their respective stories.

Defendant contends that the finding of the court is contrary to the law and the evidence in that plaintiff Wesley Cleveland was guilty of contributory negligence. Complaint is also made as to certain rulings on evidence.

We shall not enlarge this opinion by a lengthy narration of the conflicting details in the testimony as to the manner in which this accident occurred. The material question involved was one of fact and particularly within the province of the trial court to decide. There was evidence to support the finding of the court and we are not in a position to say that the finding was either against the manifest weight of the evidence or based upon any error in admission of evidence.

The judgment of the Municipal Court of Chicago is affirmed.

Judgment affirmed.

Schwartz, P. J., and Robson, J., concur.

5773 A

General No. 10700 Agenda No.

IN THE

APPELLATE COURT OF ILLINOIS

- - -

SECOND DISTRICT

- - -

October Term, A.D. 1953

GRACE E. COLLINS, Plaintiff-Appellee vs. MAX I. RUBY and BERNARD RUBY, Defendants-Appellants	Appeal from the Circuit Court of Du Page County

Dove, J.

The record in this case discloses that on June 29, 1948, about eleven o'clock in the morning, the plaintiff was driving her Pontiac automobile in a westerly direction on State Route No. 56, also known as Butterfield Road. At the same time, Max Ruby, one of the defendants, as the agent of the other defendant, Bernard J. Ruby, was driving a Plymouth automobile which belonged to Bernard J. Ruby on York Road, which is a north and south, two-lane, paved highway, and upon the occasion in question, Max Ruby was driving north approaching the intersection of York Highway with Butterfield Road. Butterfield Road is a preferential highway with standard stop signs at the southeast corner of the intersection facing south

and at the northwest corner facing north. As the plaintiff approached the intersection, she observed the Ruby car some three hundred feet to her left on York Road proceeding in a northerly direction and saw another car at her right which was being driven by Wendell Wellick in a southerly direction on York Road. The plaintiff stopped her car about ten feet east of the pavement on York Road and then proceeded across the intersection and was struck by the Ruby car which, according to the testimony of Wendell Wellick (whose evidence was not contradicted), "went straight through the stop sign and hit the plaintiff's car at the middle of the intersection."

Thereafter the instant complaint was filed averring that the plaintiff at the time of the collision and at all times prior thereto was in the exercise of ordinary care for her own safety and the safety of her automobile; that the automobile driven by Max I. Ruby was owned by the defendant, Bernard J. Ruby, and that Max was acting as the agent of Bernard J. Ruby upon the occasion in question, and charging Max I. Ruby with various acts of negligence in the operation of the Plymouth automobile. The plaintiff sought to recover the damages she sustained as a result of the collision to her automobile and for the injuries she sustained to her person.

The defendants, by their answer, admitted that the cars of the parties came together at the intersection of York and Butterfield Roads as alleged, and that the defendant, Max I. Ruby, was operating the automobile owned by Bernard J. Ruby, and

that upon the occasion in question Max was acting as the agent of Bernard. The answer denied that the plaintiff was in the exercise of due care and denied the several charges of negligence. The issues thus made were submitted to a jury resulting in a verdict and judgment in favor of the plaintiff for $15,000.00 and defendant appeals.

Counsel for appellants insists that the trial court erred in refusing to direct a verdict at the close of the plaintiff's evidence. In our opinion, the only verdict warranted by the evidence was returned by the jury. That evidence disclosed that the collision occurred about eleven o'clock in the morning of a clear June day. The pavement was dry, and there was nothing to obstruct the vision of the driver of the Ruby car if he looked toward the east as he approached the intersection. Appellee testified that she was travelling along and as she approached the intersection she was travelling at the rate of 30 or 35 miles per hour. She then testified: "As I approached York Street I looked to the left and there was a car about 300 feet down the road. I looked to the right and there was a jeep station wagon approaching the stop sign. I waited for him to come to a stop and then I started across the highway. The station wagon was driven by Wellick and the other automobile was a Plymouth coupe and driven by Max Ruby. As I approached York Road I stopped and after I saw Wellick's car stop I started across York Road, got to about the center, heard the screeching of brakes and don't know what happened after that."

Wendell Wellick testified that upon the occasion in question he was driving a Willy's station wagon in a

southerly direction along York Road and that he brought his car to a stop at the stop sign on York Road at its intersection with Butterfield Road. As abstracted this witness then testified;" I was in the west lane when I stopped. I would say I was about 20 or 25 feet from the other (Butterfield) highway when I stopped. The Pontiac was the only car I saw when I stopped. The Pontiac was about 150 or maybe 200 feet from the intersection. It was going west. I did not see any other automobile. As the Pontiac got closer I turned to the right, I remember, and I looked to the left, and I looked back up, and here comes a car from the south and it came right straight through the stop sign and hit the Pontiac. It turned off a little bit to the left at the last minute. Max Ruby was driving a 1941 Phymouth, Mrs. Collins was driving a Pontiac".

From this evidence the jury found by its verdict that the plainitff was in the exercise of due care just before and at the time of the collision and that the driver of the Ruby car was negligent and we think the evidence abundently sustains those findings.

It is also insisted by counsel for appellant that the trial court erred in not withdrawing a juror and declaring a mistrial because during the examination of the witness Mellick the following occured.

Mr. Bunge: (counsel for appellee) Q. "After the accident did you have any conversation with either Max Ruby or Bernard J. Ruby?"

A. "Bernard Ruby."

Q. "Where was that?" A. "In the Elmhurst store of Ruby's."

Q. "What was that conversation?" A. "Well - - -"

Mr. Elliott: (Counsel for appellant) "Just a minute. Is he a defendant?"

Mr. Bunge: "Who?"

Mr. Elliott: "Bernard Ruby?"

Mr. Bunge: "Yes."

The Witness: "I asked him what kind of insurance he had, that I wanted to get something straightened around."

Mr. Elliott: "I move now that a juror be withdrawn; that the answer is objectionable, and a juror be withdrawn as prejudicial."

The Court: "I will see counsel in chanbers."

Thereupon counsel for the parties and the court withdrew, and in chambers, outside of the presence and hearing of the jury, the following colloquy took place:

Mr. Elliott: (Counsel for appellant) "That has put this case in nice shape, because there has been another plaintiff that has stepped out of the case, that the jury must know has been settled with, and now they tell the jury that there is an insurance company here."

Mr. Bunge: (Counsel for appellee) "I had no intention of bringing out anything of that character. If I thought he would I certainly would not have asked him."

Mr. Elliott: "What could Ruby, who was not at the scene of the accident - - - what could he have told him?"

Mr. Bunge: "He said it was his automobile, and his father (son) was driving it."

Mr. Elliott: "Well, I move to withdraw a juror and have a mistrial declared. Certainly that fact is before the jury now, of insurance."

Mr. Bunge: "It is just one of those things."

Mr. Elliott: "Whether or not it is intentional on your part, Gordon, the fact is there, that is all."

The Court: "What did he say? Will you read the answer please?"

Thereupon the reporter read the former answer: "I asked him what kind of insurance he had, that I wanted to get something straightened around."

The Court: "Well, on the shape of the record now, it simply raises a question; it does not answer it. The objection is going to be sustained to the answer."

Upon the return of court and counsel to the court room, the court then stated to the jury: "The objection is sustained to the last answer and the jury is instructed by the Court to ignore the answer as though it had never been made, as it is immaterial entirely to the issues in the case. You may proceed counsel."

Counsel for appellants, in his argument, concedes that this question and answer standing alone might not mean much but insists that the amount of the verdict in this case indicates that the jurors were influenced by something other than the testimony in the case and concludes that this "something" was "insurance." We do not think so. There is nothing in this

Mr. Sunge: "He said it was his intention, and the liquor (sic) was drinking it."

Mr. Elliott: "Well, I have no evidence a liquor and have a material deference. Certainly that fact is before the jury now, of importance."

Mr. Sunge: "It is just one of those things."

Mr. Elliott: "Whether or not it is intentional on your part, Sorion, the fact is there, that is all."

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Thereupon the reporter read the former answer:

"I asked his what kind of insurance he had, that I wanted to get something straightened around."

The Court: "Well, in the issue of the record now, it simply raise a question: it does not answer it. The objection is going to be sustained by the answer."

Upon the return of counsel and counsel to the jury room, the court then stated to the jury: "The objection is sustained to the last answer and the jury is instructed by the court to ignore the answer and things it had never been made, as it is immaterial entirely to the issues in the case. You may proceed counsel."

Counsel for appellants, in his argument, concedes that this question and answer standing alone might not mean much but insists that the amount of the verdict in this case indicates that the jurors were influenced by something other than the testimony in the case and contends that the "something" was "influence." We do not think so. There is nothing in this

answer to establish that there was in fact insurance. It indicates, as counsel for appellee point out, that the witness was interested in finding out whether there was or was not insurance, and it must be borne in mind that this witness was not a party to the suit. The court properly instructed the jury to disregard the answer, and we are convinced that counsel for appellee had no intention of bringing before the jury any reference to insurance. There is nothing in this record to indicate that this answer was deliberately elicited by plaintiff's counsel, and under the facts found in this record and the applicable authorities, the trial court did not err in denying the motion ~~to~~ declaring a mis-trial. (Williams v. Consumers Co., 352 Ill. 51; Alden v. Coultrip, 275 Ill. App. 306.)

It is finally insisted that the verdict and judgment based thereon is excessive, and in support of this contention counsel call our attention to the fact that the record disclosed plaintiff received no fractures but only bruises and an injury to the left side of her head resulting in a possible concussion. The defendants presented no evidence in their own behalf, and the only witnesses testifying at the instance of the plaintiff, in addition to herself and her husband, were Wendell Wellick and Dr. H. R. Feldott, plaintiff's personal physician. The nature of her injuries and the treatment she received for them is fully disclosed by the testimony of the plaintiff, her husband, and by Dr. Feldott. After the collision, plaintiff was taken to the Elmhurst Hospital, where a preliminary examination was made and X-rays were taken. These X-rays revealed no fractures. Although badly shaken up and bruised and unsteady, plaintiff was returned to her home. The next

morning she was unable to move, and her family doctor, Dr. Feldott, was called. Before the accident, according to Dr. Feldott, the plaintiff was in good health. When Dr. Feldott saw her on the morning after the accident, he found she had a severe head injuiry - in the left parietal occipital region, the soft tissues of the scalp were swollen and there was an erosive type of burn, the size of a half-dollar in that region. She had severe pains in her head, back and legs and had an indentation on her left leg. From the shoulder to her ankle on the left side she was black and blue. On her right side, she was similarly bruised but to a lesser degree. Her pain, noticeable throughout her body, was localized on the left side of her head, behind her ear, down her spine and in her legs. The indentation in her leg has continued and is permanent, according to Dr. Feldott. She suffered a concussion and at the time of the trial she was still dizzy and suffering pain in her head, neck and back and it was the doctor's opinion that the pain in her head was of indefinite duration and possibly permanent.

The record further discloses that the plaintiff remained in bed six weeks after the accident under Dr. Feldott's treatment which he continued for several months. She later developed an inflamatory condition, which caused the doctor to perform an exploratory operation in August of 1948, at which time he removed her gall bladder and appendix and several adhesions. The doctor stated that the removal of the appendix and gall bladder were in no way connected with the accident but in all probability the adhesions were, as they were of fairly recent origin. The plaintiff was highly nervous after the accident and developed a neuritis of the sciatic nerve, which, in the doctor's opinion, had a causal connection

with the accident and might continue for the rest of her life. The plaintiff also became deaf in one ear and it was the doctor's opinion that this condition was traceable to the head injuries she sustained in the accident. She also suffered from arthritis of the spine, which the doctor asserted might well have been caused by the injuries she received. This trial was had almost five years after the accident and at that time she testified she was still suffering from a continuous pain in the back of her neck and also in her back and she is nervous, dizzy, at times, unteady on her feet and unable to do her house work. Her medical expenses while undergoing treatment for her injuries were substantial and while plaintiff suffered no broken bones as a result of this collision it is apparent that she was seriously and permanently injured and in addition to the injuries to her person which she received there was also a repair bill on her car in the sum of $850.00

The assessment of damages by a jury constitutes a finding of fact which is binding on the trial court and on the reviewing court unless it appears that the damages awarded are glaringly excessive, or that the jury was moved by passion or prejudice or other improper motive. (McNamara vs. King, 2 Gilman, 432; Mahannah vs. Bergfeld, 274 Ill. App. 97; North Chicago Street R. R. Co. vs. Zeiger, 182, Ill. 9.)

We find nothing in this record to indicate that the jury was moved by passion or prejudice or other improper motive and while the damages are large there are not so excessive as to warrant us in disturbing the finding of the jury which has been approved by the trial court. There is no reversible error in this record and the judgment must therefore be affirmed.

Judgment affirmed.

4 A

11 I.A.2d 219

46079

LEO KRZYZANOWSKI, Appellant,	)	
	)	APPEAL FROM CIRCUIT COURT,
v.	)	
	)	COOK COUNTY.
ANNA MAKOWSKI et al., Appellees.	)	

MR. PRESIDING JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order sustaining a motion for summary decree and dismissing the complaint for want of equity. The complaint alleged that plaintiff had recovered judgment for $1,000 in the Municipal Court of Chicago on June 13, 1951; that thereafter a writ of fieri facias was duly returned "no property found"; that the defendant Anna Makowski had an equitable interest in certain real estate and that plaintiff sought to subject that interest to the satisfaction of the judgment. The amended answer filed by Anna Makowski alleged that the judgment in question was not valid because the Municipal court had previously thereto, in the same case, entered a judgment by consent for $500; that the judgment by consent was wrongfully vacated and a judgment for $1,000 entered. A motion for summary decree with supporting affidavit and exhibits to establish the facts set forth was presented to the court, together with a tender of $500 in payment of the original judgment.

The court overruled a motion by plaintiff to strike the motion for summary decree and denied plaintiff leave to file a reply on the merits supported by counter-affidavits.

Plaintiff by its motion to strike raised only the question of the legal sufficiency of defendants' motion to strike. We are aware that there is some question in the trial courts as to whether it is proper for respondent to a motion for summary judgment to do other than join issue at once on both the law and the facts. Still, where such a motion to strike is entertained by the court, respondent should not be precluded from being given an opportunity to set up a defense on the merits when his point of law is overruled. In Wainscott v. Penikoff, 287 Ill. App. 78, the court said, in so many words, that it was proper for the defendant to test the sufficiency of the plaintiff's affidavit and motion for summary judgment by a motion to strike. Plaintiff insists that this was obiter dicta. However, in Scovill Mfg. Co. v. Cassidy, 275 Ill. 462, 470, the court laid down the rule that judicial dictum, as distinguished from obiter dictum, constitutes precedent. By judicial dictum, the court meant that the deliberate expression of an opinion upon a point in a case had the force of precedent. In that respect the case of Wainscott v. Penikoff supports the position of the defendants.

Defendant Anna Makowski contends that the first judgment entered by the Municipal court having been by consent, it could not thereafter be set aside and that, therefore, the Municipal court lost all jurisdiction to entertain the motion to vacate, to set aside the judgment, and to enter the new order. The full order of the Municipal court at the time of

the entry of the original judgment is to be found at Record 62. Here, after reciting that judgment by consent is entered for $500, there is the following notation: "Motion to vacate judgment continued to 3/1, 1951." This lends support to plaintiff's assertion that he could show, if given an opportunity, that at the time of the entry of this judgment it was understood that payment was to be made by March 1, 1951, and if not so made, that the judgment would be vacated and a trial had; that payment was not made; that the case came up on March 22, 1951; that the attorney for defendant Anna Makowski was present and made no objection to the vacation of the judgment, made no objection to the trial, and took no exception to the entry of the judgment for $1,000. Where it appears from the order itself that a judgment by consent is subject to further proceedings such as a motion to vacate, the indestructible character of a consent judgment is thereby qualified. It is in effect saying, "While we have agreed to this judgment, there are circumstances under which it may be vacated."

The decree is reversed and the cause remanded, with directions to overrule the motion for summary judgment and to take such further proceedings as are not inconsistent with the views herein expressed.

Decree reversed and cause remanded, with directions.

Tuohy and Robson, JJ., concur.

[illegible] of the original judgment is to be found at Record [illegible]. Here, after recalling that judgment by default is [illegible] for [illegible], there is the following notation: "Motion [illegible] vacate judgment continued to [illegible], 1971." While [illegible] must to plaintiff's assertion that he wasn't there, it raises an inconsistency, that of the time of the entry of this judgment. It was understood that payment was to be made by March 1, 1971, and if not so made, then the judgment would be vacated and a trial held; that payment was not made; the case came up on March 24, 1971; that the attorney for defendant Anna Rokowski was present and made no objection to the vacation of the judgment, made no objection to the trial, and took no exception to the entry of the judgment for $1,000. There is nothing from the record itself that a judgment by default is sufficient to justify proceeding upon a motion to vacate, the jurisdictional character of a judgment judgment is thereby avoided. It is in effect saying, "While we have [illegible] in this judgment, there are other instances which it may or may not."

The dissent is very [illegible] and [illegible]. With [illegible] to overrule [illegible] judgment and to take such further [illegible] as we not inconsistent with the views [illegible] expressed.

[illegible] and cause remanded for [illegible].

Justice and Judson, J. [illegible] dissent.

46116

5

A

ARNOLD ASPLUND,
Appellee,

v.

ROY O. PAVLIK, doing business as PAVLIK BROTHERS,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment on a verdict in the amount of $25,000 for personal injuries.

Plaintiff was in the business of repairing bodies and fenders of damaged automobiles. Certain types of work which he could not handle in his own shop, he took to defendant, who was equipped to do major repair work. He had been doing this for about three years prior to the time of the accident, December 22, 1951. A week or ten days before the accident, plaintiff had sent an employee of his, Livery Brown, to deliver a rear axle to defendant's shop. On December 22nd between noon and 2 PM, plaintiff went to defendant's place of business to pick up the rear axle and to make a payment on his account. On entering the building, he was told that the axle had been repaired and was directed to "go out and see Nick." Upon inquiring where he could see Nick, he was told to go out in the shop where the work had been done. Plaintiff had on other occasions been directed to go to the rear of the shop where they did the machine work; that was the usual way in which he picked up repaired material. Before going to the rear of the shop, he went into defendant's office and made a payment of $100 on his account. Upon entering the shop, Nick, who was Nicholas J. Schwall, upon inquiry

pointed out to plaintiff the repaired axle which was lying against the north wall of the machine shop, along with other parts for customers. Plaintiff picked up the axle and walked toward a door leading to the outside. He had taken two or three steps toward the door when his foot slipped on some grease and he went down on his right knee. The end of the axle which he was carrying struck the floor. Plaintiff carried the axle out of the door and laid it down. His back was "awful sore." He dragged the axle to his car and placed it in the trunk compartment. Livery Brown testified that at the time he delivered the axle to defendant for repair some days before the accident, he observed a grease spot in the same location as the spot on which plaintiff slipped.

The injuries which followed as a result of plaintiff's fall were the basis for the verdict and judgment in question, and the amount thereof is not disputed by defendant.

The first point on which defendant seeks a reversal is that plaintiff was guilty of contributory negligence as a matter of law. We can only find this if we conclude that all reasonable minds would agree that plaintiff's conduct under the circumstances constituted such contributory negligence. In this respect, defendant argues that when plaintiff entered the room where the grease spot was located and was told by Nick to come and get his axle, the spot was plainly visible to him; that he should have observed and avoided it; that when he picked

up the axle, he did not start back to the door he had entered, but instead, went to a door leading outside, thus taking a different way than that by which he had come in and that hence it was up to him to look out for grease spots such as this one, and that having failed to do so, he was guilty of contributory negligence. Some may think that plaintiff did owe this duty, but some would disagree and those who disagree could well be reasonable men. It hardly serves a good purpose to seek an analogy which can serve as a precedent in the innumerable cases cited on this subject, no two of which are alike. However, we will consider some of these cases.

Defendant at the outset of his argument cites Illinois Central R.R. Co. v. Oswald, 338 Ill. 270, in which the court laid down the general principle upon which defendant relies, that is, that the evidence with all reasonable inferences to be drawn from it in the aspect most favorable to plaintiff failed to show that he was in the exercise of due care. There, in the middle of the night the plaintiff and her husband were driving across a bridge when dense smoke from the defendant's engine enveloped them and they were struck by another car. The plaintiff got out and went to the rear to see what damage had been done and while she was between two cars, a third car struck the second one and forced it forward, striking the plaintiff. There was a sidewalk which the plaintiff could have used. She could have waited on the walk until the smoke cleared. The Supreme court felt that under these

circumstances, the plaintiff was guilty of contributory negligence as a matter of law. There is a substantial distinction between that case and this. The very nature of the circumstances in that case required the plaintiff to exercise great care in getting out on the roadway while dense smoke was overhead. Recently, in Sims v. C.T.A., 351 Ill. App. 314, we held that a person perilously treading a path between streetcars was guilty of contributory negligence as a matter of law. There again, a path of danger, which must be recognized as such by all reasonable men, was taken by the plaintiff. That is not the case here. This is much more like the cases of Dowling v. MacLean Drug Co., 248 Ill. App. 270; Chicago & Alton R.R. Co. v. Gore, 202 Ill. 188; Ellguth v. The Blackstone Hotel, 408 Ill. 343; Van Wye v. Robbins, 40 Cal. App. 2d 660, 120 P. 2d 507; and Cathcart v. Sears Roebuck & Co., 120 Pa. Super. 531, 183 Atl. 113.

Defendant argues that no negligence is shown. Here again, the question is obviously one for the jury and, under the circumstances of this case, is closely related to the question of contributory negligence which we have heretofore discussed. It is true, as defendant says, that he did not owe plaintiff the duty of an insurer, but only the duty to exercise ordinary care. The question before us, however, is not whether we find that defendant exercised ordinary care, but whether there was sufficient evidence to support the finding of the jury. This turns entirely on whether the jury believed plaintiff's witnesses. Obviously, they did. We must assume that they believed both Nicholas

Schwall and plaintiff. From their evidence the jury could properly find that plaintiff was directed by defendant's employee to the place where the axle stood; that this place was dangerous by reason of the grease spot; that defendant had not exercised care to see that it was made safe; and that this was negligence on the part of defendant which was the proximate cause of the injury.

Defendant complains of instruction No. 8 given on behalf of plaintiff. This instruction sets forth charges of negligence made in plaintiff's complaint and the essential elements of plaintiff's case, including the requirement that the jury find "That defendant knew, or by the exercise of reasonable care should have known, of the unsafe condition of the floor." It concludes with a paragraph which advises the jury that defendant denied the charges of negligence and allegations in the complaint. The instruction is well worded and not repetitious and is not used, as so many instructions of this sort have been in the past, for the purpose of having the court set forth with emphasis plaintiff's theory of the case. Defendant complains of it because he says it should have included some provision that defendant should have had notice of the defect for a sufficient length of time to remedy the condition. This we think is essentially implicit in the instruction itself. We find no error in the instruction.

Judgment affirmed.

Tuohy and Robson, JJ. concur.

6 A

46132

GEORGE ECKEL and PEARL ECKEL, Appellees,	)	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
v.	)	
WOLE KOLEFF, Appellant.	)	

MR. PRESIDING JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment rendered in a suit under the U.S. Housing and Rent Act of 1947, as amended and the regulations issued thereunder. The statement of claim alleged that for the period between March 24, 1951 and January 14, 1952, defendant, landlord of the apartment occupied by plaintiffs, charged them $22 per week rental when the maximum legal rental pursuant to said act was $22 per month. No question was raised with respect to the jurisdiction of the trial court. Defendant denied the allegations, and the issue was submitted to a jury. Four special interrogatories were asked, as follows:

"1. Were the plaintiffs overcharged by the defendant?

"2. If you find that the plaintiffs were overcharged by the defendant, what is the total amount of the overcharge?

"3. If you find that the plaintiffs were overcharged, was the collection of the overcharges by the defendant willful?

"4. If you find that the plaintiffs were overcharged, in the collection of the overcharges by the defendant did the defendant take practicable precaution against collecting the overcharges?"

[illegible]

GEORGE EDWARD and FRANK [illegible], Appellees, v. [illegible], App-llant.	[illegible] MINERAL [illegible] COURT OF [illegible].

Mr. PRESIDING JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment rendered in a suit under the U.S. Housing Act from act of 1937, as amended and the rental rules issued thereunder. The statement of claim alleged that on the [illegible] between March 24, 1951 and January 1, 1952, [illegible] of the apartments occupied by plaintiffs, there was being 80% per week worked when the maximum legal rental [illegible] to said act was 15% per month. No [illegible] with respect to the interpretation of the rules [illegible] defendant denied the allegations, [illegible] submitted to a jury. Four special interrogatories were asked, as follows:

"1. Were the plaintiffs overcharged by the defendant?

"2. If you find that the plaintiffs were overcharged by the defendant, what is the total amount of the overcharge?

"3. If you find that the plaintiffs were overcharged, was the [illegible] of the overcharge by the defendant willful?

"4. If you find that the plaintiffs were overcharged, is the [illegible] of the [illegible] by the defendant the [illegible]

To interrogatory 1, the jury answered "Yes." To interrogatory 3, the jury answered "Yes." To interrogatory 4, the jury answered "No." To interrogatory 2 the jury answered "$671.00." The jury also brought in a verdict as follows:

> "We, the jury, find the defendant, Wole Koleff, guilty as charged in plaintiff's statement of claim and assess damages in the sum of Six Hundred Seventy one and 00/100 Dollars ($671.00)."

On a form entitled "Instruction to Jury as to Form of Verdict," which advised the jury what to do with respect to the form of verdict if they found in favor of plaintiffs, the jury erroneously filled in the blank with the figure "$671.00." The jury was also given an instruction telling them the form to use if they found for defendant, and this they erroneously returned as follows:

> "If the jury find in favor of the Defendant the form of their verdict will be as follows:
>
> "VERDICT
>
> "We, the jury, find for the Defendant: <u>guilty of willful overcharge</u>." (Italics ours.)

No record of the evidence and no record of what occurred at the time of the entry of the judgment on the verdict has been presented to the court. All that we have before us is that on February 18, 1953, the court entered an order denying the motion for judgment <u>non obstante veredicto</u>, ordering the motion for new trial be withdrawn, giving plaintiffs judgment for $999, and allowing the sum of $333 attorneys' fees, in addition to the amount of said judgment, to be taxed as part of the costs of suit.

To interrogatory 1, the jury answered "Yes." To interrogatory 2, the jury answered "Yes." To interrogatory 3, the jury answered "No." To interrogatory 5 the jury answered "$8,000.00." The jury also brought in a verdict as follows:

> "We, the jury, find the defendant, Dale Kohler, guilty as charged in plaintiff's statement of claim and assess damages in the sum of Six Hundred Seventy one and 00/100 Dollars ($671.00)."

On a form entitled "Instruction to Jury as to Form of Verdict," which advised the jury what to do with respect to the form of verdict if they found in favor of plaintiff, the jury previously filled in the blanks with "$671.00." The jury was also given an instruction on "Form of the Form to use if they found for defendant," and this they erroneously returned as follows:

> "If the jury find in favor of the defendant the form of their verdict will be as follows:
>
> "VERDICT
>
> "We, the jury, find for the defendant against the plaintiff."

(Emphasis added.)

No record of the evidence was made of what occurred at the time of the entry of the judgment on the verdict nor has been presented to the court. All that we have before us is that on February 24, 1973, the court entered an order denying the motion for judgment notwithstanding the verdict, ordering the action to be dismissed by defendant, giving plaintiffs judgment for costs, and fixing the fee of $333 attorney's fees in a "litigated" amount in such litigation, to be taxed as part of the costs of suit.

A motion to vacate the judgment was filed February 27, 1953, in which it was alleged for the first time that the statement of claim was filed as a first class action and that it was not within any of the classes of cases within the jurisdiction of the Municipal court as of the date jurisdiction was invoked; that the 1951 amendment to the statute enlarging the jurisdictional amount in this kind of case from $1,000 to $5,000 was not applicable, nor was there any jurisdiction under the statute, even as amended, and that the amendment was in any event unconstitutional. The motion to vacate was denied March 5, 1953, and on March 13, 1953, notice of appeal was filed. On the same day plaintiffs asked leave to amend their statement of claim to comply with the proof in the case, which motion the court postponed until March 18th. On March 23, 1953, plaintiffs filed an amended statement of claim, showing an overcharge of $671 based on a rental of $25.30 a month instead of $22 a week. The praecipe for record filed by defendant omitted a transcript of the evidence and of proceedings had before the court after entry of the verdict, the answers of the jury to the special interrogatories, instructions to the jury, the amended statement of claim, the order granting leave to file it, and the statement of the trial judge of his reasons for entering the judgment.

It is urged by defendant that the trial court was without jurisdiction; that this is an action for a

A motion to vacate the judgment was filed February [illegible], 1952, in which it was alleged for the first time that the statement of claim was filed as a first class action and that it was not within any of the classes of cases within the jurisdiction of the Municipal Court as of the date jurisdiction was invoked; that the 1951 [illegible] to the statutes enlarging the jurisdictional amount in this kind of case from $1,000 to $2,000 was not [illegible], nor was there any jurisdiction under the statutes [illegible] amended, and that the judgment was in any event [illegible] attributed. The motion to vacate [illegible] and on March 13, 1952, notice of [illegible] was [illegible] the same day plaintiffs asked leave to amend their [illegible] of claim to comply with the [illegible] motion was [illegible] granted April [illegible], 1952. On March 25, 1952, plaintiffs filed an amendment [illegible] showing an overcharge on 1951 based [illegible] a month instead of 30 a month. The amended [illegible] filed by plaintiffs omitted a finance [illegible] and of prejudgment [illegible] verdict, [illegible] judgment [illegible] motions, [illegible] of claim. [illegible] motion to [illegible] the judgment.

[illegible] the total amount was [illegible] jurisdictional [illegible] in an action for a

penalty inflicted by statute; that such an action is, when limited to $1,000, within the fourth class and not the first class; that the fact that judgment was reduced to $999 does not affect the question of jurisdiction because that is determined by the pleadings which show a claim in excess of $1,000; that even if the suit had been filed as a fourth class action, there is still no jurisdiction because the judgment was in excess of $1,000 by reason of the fact that the court, in addition to the $999, allowed $333 as attorneys' fees.

Under the Municipal Court Act, a case commenced as one of the first class may be changed to one of the fourth class, or vice versa, upon such terms as to costs and notice to the parties as may be provided by the rules of the court. Under Rule 1 of the Municipal Court Rules it is provided that an erroneous classification shall not affect the validity of the order or judgment therein and a transfer is permitted from one class to another.

It was obviously the intention of the legislature and the purpose of the rule to liberalize the practice and to avoid error because a proceeding was placed in one class when it should have been in another. There are still some differences between practice in first and fourth class cases of the character here involved, but it would be folly to compel litigants to retry their cases under such circumstances, particularly where, as here, no

penalty imposed by statute; that such an action is, when limited to $1,000, within the fourth class and not the first class; that the fact that judgment was reduced to $900 does not affect the question of jurisdiction because that is determined by the pleadings; that where a claim in excess of $1,000; that even if the suit had been filed in a fourth class action, there is still no jurisdiction because the judgment was in excess of $1,000 by reason of the fact that the court, in addition to the $900, allowed $127 as attorney's fees.

Under the Municipal Court act, [illegible] as owner of the first class [illegible] fourth class, or vice versa, upon such terms [illegible] and notice to the parties [illegible] of the [illegible] of the court. Under this [illegible] it is practically [illegible] affect the validity of the [illegible] transfer is permissible [illegible].

It was obviously [illegible] and the purpose of the suit is like [illegible] to [illegible] class when it should have been in another. There is still some difference between [illegible] fourth class cases of [illegible], but it would be [illegible] under [illegible] of the above [illegible]

question was raised with respect to jurisdiction of the court prior to trial. A litigant should state his objection on such a ground at the first opportunity, instead of letting his opponent and the court go through a complete trial before raising it. We hold that defendant thereby waived the objection. Birks v. Houston, 63 Ill. 77; DeJarnatt v. Marquez, 64 Pac. (Cal.) 1090. Malina v. Oplatka, 304 Ill. 381, cited by defendant, was decided before the adoption of the amendment to the Municipal Court Act permitting the transfer of cases from one class to another. Barnard v. Rubin, 341 Ill. App. 251, related to the County court, where there is a general limitation on amount and from the meager statement in the opinion in that case, it is difficult to derive any analogy pertinent to the case before us. In Fine v. Unschuld, 324 Ill. App. 274, judgment was entered for $2,500 in a tort case, where jurisdiction in such cases is limited to $1,000.

The subject matter of the suit was properly one for the Municipal court. Regan v. Kroger Grocery & Baking Co., 386 Ill. 284, 301. There the court had under consideration a suit to recover for alleged violations of the Emergency Price Control Act. An appeal was taken from a judgment in favor of plaintiff rendered by the Municipal Court of Chicago. The judgment was affirmed, and in the course of affirmance the court said that whether the act be regarded as penal or remedial made no difference in that case. It is true that in Rowan v. Matanky, 348 Ill. App.

question was raised with respect to furnishing of the court prior to trial. A litigant should assert his objection on such a ground at the first opportunity, instead of letting his opponent and the court go through a complete trial before raising it. We hold that defendant timely waived the objection. Duke v. Lauritzen, 65 Ill. App. 2d 1; Dabrowski v. Kaminski, 64 Ill. App. (2d) 1966. Mullen v. Jackson, 30 Ill. App. 2d 1, 14. Stand by defendant, was decided before the adoption of the amendment to the Judicial Court Act permitting the transfer of cases from one court to another. Bennett v. Smith, 21 Ill. App. 2d, 1, 14, 1964 in the County court, where there is a maximum limit of the amount and from the proper authority in the probate court case, it is difficult to derive any analogy to the case before us. In Lipe v. Lipe, 34 Ill. App. 2d, 1, 14, 1964, judgment was entered for defendant in a tort case, there jurisdiction in such cases is limited to $3,000.

The subject matter of the suit was [illegible] for the municipal court. Bonar v. [illegible] 20, 1964 Ill. App. 2d. Since the [illegible] constitutional [illegible] lawsuits [illegible] damages [illegible] judgment in favor of [illegible] in the municipal court of Chicago. The judgment [illegible] in the course of affirmance [illegible] the [illegible] be proper [illegible] in that case. It is true that in Lipe v. Lipe, 34 Ill. App. 2d

296, the court held that a suit for damages under the Federal Housing and Rent Act was not a suit under a contract express or implied, but an action for statutory damages in the nature of a penalty. However that may be, the court had jurisdiction of the subject matter of this suit, and where the question involved is that of classification, the failure of a defendant to raise the question of jurisdiction until after trial constitutes a waiver. (See cases supra.)

We have not found it necessary to pass upon the validity of the 1951 amendment to the Municipal Court Act in the determination of this case.

With respect to the forms of verdict, it is clear that the jury intended to find defendant guilty and that they were confused by the blank forms of verdict set forth in the instructions to them. We have observed that on a number of occasions juries have been misled in this manner, and we believe that these forms of instruction ought to be dispensed with. It is the intention of the jury which is decisive, and there is no doubt whatever that they intended to decide for plaintiffs. People v. Moretti, 415 Ill. 398. That part of the verdict of the jury referring to the assessment of damages is entirely surplusage. Under the law the court is charged with that duty and the court properly undertook to assess the damages.

We have not discussed the other points raised

by defendant, but we consider them to be without merit. We think there was considerable merit in plaintiffs' motion to dismiss the appeal, but as we have considered the case on the briefs, the motion is hereby denied.

Appellant says that he did not think it necessary to provide a transcript of evidence of what occurred at the time the court entered its judgment and that if it should appear to the appellees that such a transcript was necessary, he could provide it. It is not for the appellant to offer a scanty record to this court and thereby put the burden of filing an additional abstract upon the appellee. It is obvious that at the time the court entered its finding for $999 plus attorneys' fees in the amount of $333, something was said and done which could have enlightened us on these proceedings. For example, it appears that the motion for a new trial was withdrawn. While the act in question provides for attorneys' fees, it does not provide for them as a part of the costs. We are of the opinion that the allowance of attorneys' fees in addition to the amount of the judgment should not have been made.

Judgment of the Municipal court is reversed and judgment is entered here in favor of plaintiffs for $999 and costs.

Judgment of Municipal Court reversed and judgment for plaintiffs for $999 and costs.

Tuohy and Robson, JJ., concur.

by defendant, but we consider them to be without merit.

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Judgment of the lower court is reversed and judgment is entered here in favor of plaintiff for $999 and costs.

[illegible]

Judge [illegible], [illegible], concur.

46038

MILDRED E. MAGILL, executrix of the last will of CLARK R. W. MAGILL, M.D., deceased, Appellee,	)	APPEAL FROM SUPERIOR COURT, COOK COUNTY.
v.	)	
PAUL P. GEORGE, Appellant.	)	

MR. JUSTICE ROBSON DELIVERED THE OPINION OF THE COURT.

This is an appeal after retrial of a case in which this court reversed a judgment for the defendant. Magill v. George, 347 Ill. App. 6. Plaintiff as executrix of the estate of Dr. Clark R. W. Magill, deceased, filed her action against the defendant, Paul P. George, for damages for the death of the decedent. The accident occurred shortly after midnight on May 30, 1948, when an automobile of the decedent eastbound on Washington boulevard was involved in a collision with the automobile of the defendant which was being operated in a southerly direction on Lorel avenue. It is not necessary to set forth all of the facts in that a detailed statement of them are set forth in the previous case and for the purpose of this decision the facts may be considered to be substantially the same.

Defendant contends that the giving of the following peremptory instruction for the plaintiff was reversible error:

> "The Court instructs you that if you believe from a preponderance of the evidence, under the instructions of the Court, that Paul P. George, defendant, on the occasion in question, was guilty of negligence in the management and operation of

his automobile, as charged in the plaintiff's complaint and if you further believe from a preponderance of the evidence that such negligence, if any, caused or proximately contributed to cause the injury and death complained of by the plaintiff in this case, and that the decedent was at and before the happening of said accident in the exercise of ordinary care for his own safety, then you should find the defendant, Paul P. George, guilty."

This peremptory instruction provided that if the jury find "George...guilty of negligence...as charged in the complaint," their verdict should be "guilty." An examination of the complaint shows that seven specific charges of negligence are made. There is no general charge. We have examined the other instructions and find none that advises the jury as to what acts of negligence were charged in the complaint. There are instructions that advise the jury as to three of the charges of negligence but none as to the other four.

In the recent case of Signa v. Alluri, 351 Ill. App. 11, this court traced the practice of embodying the allegations of a complaint in an instruction. We stated on page 17:

"It has long been the rule in this State that recovery can be had only on the negligence charged in the complaint. Herring v. Chicago & A. R. R. Co., 299 Ill. 214, 217; Both v. Collins, 339 Ill. App. 437, 440. So, too, it has been held error to instruct the jury with reference to negligence 'alleged in the complaint' in the absence of other or further instruction pointing out the negligence charged. Laughlin v. Hopkinson, 292 Ill. 80; Krieger v. Aurora, E. & C. R. Co., 242 Ill. 544; Schlauder v. Chicago & Southern Traction Co., 253 Ill. 154; Bernier v. Illinois Cent. R. Co., 296 Ill. 464; Lerette v. Director General, 306 Ill. 348. These cases clearly disapprove of the practice of referring to the complaint in an instruction, in the absence of clarification as to what factual matters are charged in the complaint, notwithstanding statements to the contrary

in a few earlier cases. (Ohio & M. Ry. Co. v. Porter, 92 Ill. 437; West Chicago St. R. Co. v. Lieserowitz, 197 Ill. 607, 610, and James S. Kirk & Co. v. Jajko, 224 Ill. 338, 342."

And on page 19 the following statement is made:

"Inasmuch as it appears from these decisions that the negligence to be proved in a given case must be that alleged in the complaint and that the jury has no right to speculate as to any other negligence, and inasmuch as it further appears that the negligence alleged in the complaint may not be determined by the jury from an inspection of the pleadings themselves nor from an instruction embodying in toto the allegations of such pleadings, the question arises as to how the jury may be made acquainted with the issues. The safe and proper rule, as set forth in a long line of cases * * * (cases cited) is for the court to inform the jury in a clear and concise manner of the issues raised by the pleadings. This should be accomplished by a summary of the pleadings, succinctly stated without repetition and without undue emphasis."

We believe that this case makes it very clear what in the opinion of this court the practice should be on instructions of this type. It is important that the jury should be informed of the charges made in the complaint but the forensic and repetitious language of the complaint should not be used for that purpose. It should be done, as we stated, as briefly and concisely as will permit, bearing in mind that it is the judge and not the lawyer who will be stating the matter to the jury.

An examination of all of plaintiff's instructions reveals no instruction that briefly and concisely informs the jury of the issues raised by the pleadings. In two cases, Herring v. C. & A. R. R. Co., 299 Ill. 214, and Kanousis v. Lasham Cartage Co., 332 Ill. App. 525, one of which was not cited in Signa v. Alluri, the type of

In a few earlier [illegible]. [illegible] [illegible].
93 Ill. 529; [illegible] v. [illegible],
197 Ill. 427; [illegible] v. [illegible]
254 Ill. 358, 364.

and on page 19 the following statement is made:

"Inasmuch as it appears from the defendant's [illegible] that the negligence to be proved in a [illegible] must be that alleged in the complaint and that the [illegible] no right to speculate as to any other negligence [illegible], and inasmuch as it further appears that the [illegible] in the complaint may not be [illegible] from an inspection of the pleadings [illegible] an instruction embodying in [illegible] pleadings, the question arising [illegible] may be more [illegible] with the [illegible] rule, as set forth in a form [illegible] cle 3) is for the court [illegible] and [illegible] This [illegible] instructed [illegible] urged [illegible]."

[illegible]

In this opinion [illegible]

instructions of this type [illegible]

should be incor[illegible] the [illegible]

but the [illegible]

those [illegible]

are [illegible]

borders [illegible]

who [illegible]

[illegible]

reveals the [illegible]

It [illegible]

case, [illegible]

[illegible]

of [illegible]

peremptory instruction involved in the instant case was the sole ground of reversal.

It is regrettable, indeed, to have to reverse this case for a second time. We are, however, offered no alternative in view of the rulings of our court. We have examined the other contentions of defendant for reversal and find no merit in them. The judgment of the trial court is reversed and the cause remanded with directions to grant the defendant a new trial.

Judgment reversed and cause remanded with directions.

Schwartz, P. J., and Tuohy, J., concur.

46038

MILDRED E. MAGILL, as Executrix of the Last Will and Testament of CLARK R. W. MAGILL, M.D., deceased, Appellee,	) APPEAL FROM
v.	) SUPERIOR COURT,
PAUL P. GEORGE, Appellant.	) COOK COUNTY.

ON REHEARING.

MR. JUSTICE ROBSON DELIVERED THE OPINION OF THE COURT.

In the petition for rehearing, plaintiff has failed to interpret correctly Signa v. Alluri, 351 Ill. App. 11. In that case, we said specifically that the courts of this state have disapproved of the practice of referring to the complaint in an instruction, in the absence of clarification as to what factual matters were charged in the complaint. It followed from this that the courts approved of the principle of having the jury advised of the issues that were made by the pleadings. It disapproved of the practice of using this as a basis for having the court recite the complaint to the jury in an instruction which contained all the rhetorical and argumentative language included in a complaint. We concluded, therefore, that in the trial of personal injury cases, it was desirable that a summary of the issues made by the pleadings should be succinctly given to the jury. We did not say this was vital to a proper trial of the case. If, however, an instruction such as was given in this case referred generally

to charges in the complaint, then those charges must be summarized in the manner approved by Signa v. Alluri, supra. That was not done in this case.

Rehearing denied.

Schwartz, P. J., and Tuohy, J., concur.

(8) A

46119

JOSEPH HUTTON, Appellee,	)	
v.	)	APPEAL FROM SUPERIOR COURT, COOK COUNTY.
MORGAN PACKING COMPANY, a corporation, Appellant.	)	

11 I.A.2d 222

MR. JUSTICE TUOHY DELIVERED THE OPINION OF THE COURT.

Plaintiff sued in the Superior Court of Cook County for personal injuries alleged to have been sustained by him through the negligence of defendant. From a judgment on a jury's verdict for $13,000 defendant appeals.

Defendant complains (1) that plaintiff failed to prove defendant guilty of negligence; (2) that proper evidence on behalf of defendant was excluded and improper evidence on behalf of plaintiff admitted; (3) that the verdict was excessive and that there was error in certain instructions.

There was evidence in the case tending to prove the following facts: On March 20, 1949 plaintiff was a passenger in the automobile of one John F. Curtis, plaintiff and his wife having been guests at Curtis' mother's home in Aurora, Illinois and were returning to Chicago at the time of the accident. Plaintiff was sitting on the left side in the rear seat of the automobile, and at an intersection in the City of Chicago the Curtis car came to a stop and while at a standstill was struck from the

rear by defendant's truck. The impact threw plaintiff forward, onto his knees. He testified that he had a pain on the right side of his neck following the collision, and there is considerable testimony as to his injuries, which will be considered later.

There is strong corroboration on the part of several witnesses to support plaintiff's theory of this accident. As a matter of fact defendant does not contest it, but maintains that as defendant's driver approached the scene of the accident, following the Buick car in which plaintiff was riding, as testified to by the driver, another car "jumped in, in front of me." This, he maintains, caused him to crash into the rear of the Buick. Accepting the driver's testimony as to the unexpected appearance of another car as true, even though uncorroborated, there still remained a question of fact as to whether or not he did not have opportunity to stop before crashing into the Buick car ahead. The undisputed evidence is that the Buick car was struck with such force that $480 worth of damage was caused. We do not agree that there was no evidence to support plaintiff's theory or that the jury's verdict in this respect was against the manifest weight of the evidence.

Defendant complains that he was unduly restricted in questioning police officers concerning the contents of a police report. The trial court apparently was of the opinion that the type of questioning indulged in was for

the purpose of getting before the jury the content of the police report. From our examination of the evidence we are unable to say that the trial court abused his discretion. In any event, after the trial court had advised the defendant to proceed no further with this examination, no offer of proof was made and there is nothing before us to review in this connection.

Defendant complains of the question permitted to be asked the driver for the defendant company, and answer, as to how many trucks the defendant was operating at the time of the accident, the answer being "around 200." The question asked was preliminary for the purpose of ascertaining the truck driver's skill and experience in operating various types of trucks. While the answer might properly have been stricken, we feel that permitting it to stand was a matter of slight consequence and not such an abuse of the trial court's discretion as to constitute reversible error.

Complaint is made as to the amount of the verdict. The evidence shows that prior to the accident in question plaintiff had suffered from some arthritis in the hands, although he contends that prior to the accident he was in good health otherwise, weighed 184 pounds, that after the accident he was in constant pain, was nervous, unable to sleep regularly, and that his weight at the time of the trial was 164 pounds. Dr. Theodore Fox, an orthopedic surgeon, testified that he saw plaintiff periodically from

May, 1949 to March, 1952; that on his first examination he found a limitation of motion of the cervical spine associated with pain in that region; that plaintiff had a spasm in the trapezius muscle which was the result of injury, and found muscle spasm in the right shoulder, with numbness over the shoulder on the right side. Dr. Michael I. Reiffel testified that he took x-rays and examined plaintiff in April of 1950 and found substantially the same conditions as those described by Dr. Fox, and he diagnosed plaintiff's injuries as a compression of the fourth and fifth lumbar cervical inter vertebrae disc resulting in nerve involvement, affecting the cervical nerve roots which are brachial plexes, which enervates the shoulders and arms. He testified that there could be causal connection between the accident and the injury and that the condition was permanent. A third doctor, Dr. I. Joseph Speigel, substantially corroborated the other two doctors.

On behalf of the defendant, Dr. Horace Turner was the only medical witness, and he testified that he found no pathology except that due to arthritis. He defined the narrowed disc spaces on the vertebrae as due to the arthritic condition, and testified that there was no pathology in the area due to trauma.

The extent of the injuries here was a matter for medical determination (Behles v. Chicago Transit Authority, 346 Ill. App. 220). This medical testimony was conflicting. The jury apparently believed the medical testimony of plaintiff. That being so, we are unable to say that $13,000 is

excessive for the injuries described, nor can we say that the finding in this respect is against the manifest weight of the evidence.

We have carefully examined the two instructions complained of and we find no error in either of them.

The judgment of the Superior Court of Cook County is affirmed.

Judgment affirmed.

Schwartz, P. J., and Robson, J., concur.

excessive for the injuries described, nor can we say that the finding in this respect is against the manifest weight of the evidence.

We have carefully examined the two instructions complained of and we find no error in either of them.

The judgment of the superior Court of Cook County is affirmed.

Judgment affirmed.

Schwartz, P. J., and Lohsen, J., concur.

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46165

HALVDAN REINHOLDT, etc., et al., Plaintiffs below,	
HARRY S. POSNER, Petitioner below, Appellee	APPEAL FROM
v.	SUPERIOR COURT
CARL C. MOBRICH, Defendant below, Appellant	COOK COUNTY
ARTHUR S. GOMBERG, Intervening Petitioner, Appellant	

MR. JUSTICE TUOHY DELIVERED THE OPINION OF THE COURT.

This appeal arises out of the following facts: Petitioner Harry Posner, an attorney, was engaged to represent Halvdan Reinholdt, administrator of the estate of Nils Nilsen, in an action for wrongful death. Nilsen was injured in an automobile accident on November 11, 1950, and on November 22, 1950 died as a result of those injuries. Reinholdt was a cousin of decedent. Upon filing suit Posner served notice of attorney's lien. On December 8, 1950 Maurine Nilsen, a daughter of the decedent, attained her majority and, represented by intervening petitioner, attorney Arthur Gomberg, filed petition for letters of administration in lieu of those issued to her father's cousin, Halvdan Reinholdt. The Probate Court denied the petition. An appeal was taken to the Circuit Court of Cook County, which revoked the letters theretofore issued to Halvdan Reinholdt. Shortly after, the death claim was settled for $3,500. The Probate Court approved the settlement

and awarded a fee of 25%, or $875.00, to Arthur S. Gomberg, who handled the settlement. On September 30, 1952 Posner, the supplanted attorney, presented his petition for fees. After hearing in the Superior Court, judgment was entered for petitioner Posner against respondents (defendants in the action for wrongful death). Respondent Carl C. Mobrich and intervening petitioner Gomberg, who had indemnified defendant's insurance carrier against liability for additional fees, prosecute this appeal.

Appellants urge that the notice to enforce the attorney's lien was defective. On September 25, 1952, Posner served notice that on September 30, 1952 he would ask leave to file his petition for adjudication of fees. Thereafter the petition was ordered filed and hearing set for October 19, 1952. Appellants contend that five full days are required by statute to intervene between the notice of filing and the filing of the petition. They cite Ill. Rev. Stat. chap. 13, par. 14, the pertinent portion of which is as follows:

> "* * * On petition filed by such attorneys or their clients any court of competent jurisdiction shall, on not less than five days' notice to the adverse party, adjudicate the rights of the parties and enforce such lien in term time or vacation."

The abstract shows that the notice was placed in the mail at 5:00 p.m. on September 25th, which would mean only four days intervened between the receipt of the notice and the filing of the petition. However, inasmuch as the petition was not heard until the following January, some four months intervened between the notice to the adverse party and the adjudication of the rights of the parties. The purpose of the statute was to give the party notified at least five days prior to the adjudication in which

to prepare for the hearing. We conclude that the terms of the statute have been met, and furthermore no objection to the notice having been made below, we consider any defect therein waived.

Appellants further contend that petitioner was guilty of lack of diligence in prosecuting this claim for fees inasmuch as some eight months intervened between the dismissal of the lawsuit and the presentation of the petition for fees. They apparently take the position that the petition for fees must be filed prior to the dismissal of the suit. No authority for such proposition has been cited. We think the law of this State is to the contrary. In Standidge v. Chgo. Rys. Co., 254 Ill. 524, petition for the enforcement of the attorney's lien was filed after the dismissal of the original suit.

In the instant case petitioner had a valid agreement to represent the administrator. The coming of age of the decedent's daughter undoubtedly influenced the court in revoking the letters issued to the former administrator. No criticism of the petitioner's representation of that administrator appears in this record. For the services performed while acting as attorney for the administrator in good faith, petitioner was entitled to compensation. Bennett v. C. & E. I. Ry. Co., 327 Ill. App. 76. It appears here that petitioner had a valid contract for one-third of the amount to be recovered by suit or settlement. It further appears that a valid attorney's lien for that amount was perfected. The trial court, taking into consideration the fact that the settlement was worked out by a second attorney who represented the successor administrator, concluded that the estate should not be burdened with double expense, and, apparently

influenced by such considerations, allowed the petitioner half of the amount called for by his lien. No cross-appeal has been taken or cross-error has been assigned by petitioner on the question of this amount. Accordingly the judgment of the Superior Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

Schwartz, P.J., and Robson, J., concur.

14 A

46024

HARRY LIPTON, Appellee, v. PENNSYLVANIA RUBBER COMPANY, a corporation, Appellant.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

11 I.A.2d 223

MR. PRESIDING JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Plaintiff sued to recover commissions in the sum of $4,350.78, claimed to be due under a contract of employment as a salesman for the year 1946. Defendant filed an answer and counterclaim in the sum of $1,247.73 for merchandise sold and delivered to plaintiff. Upon plaintiff's motion for summary judgment and a hearing thereon, the court entered a partial summary judgment for plaintiff in the sum of $2,885.17 and ordered a trial as to the balance of plaintiff's claim. Upon appeal from said judgment, this Court (340 Ill. App. 420) reversed the judgment and remanded the cause for a hearing upon the merits, upon the ground that the opposition to the motion for summary judgment presented a triable issue of fact.

Thereafter, the mandate of this Court was filed, and a trial was had with a jury upon the issues presented by the complaint, the answer of the defendant and its counterclaim. The jury found for the plaintiff and assessed damages in the sum of $4,063, and also returned a verdict in favor of the defendant upon the counterclaim and assessed its damages

in the sum of $1,247.73. Two judgments were entered by the trial court, one for the plaintiff and one for the defendant, instead of one judgment for the amount of the verdict for plaintiff, less the amount of the verdict for defendant.

The evidence discloses the following facts: Plaintiff sold automobile tires and kindred products for defendant from 1942 to 1947; that there was sold in his territory, during the year 1946, $482,026.09 in defendant's merchandise; that during the year he was paid his salary of $3,600 in semimonthly payments of $150, expenses of $2,100, and a net bonus of $1,718.82; that he claims that under the written agreement governing his compensation, he was entitled to an additional $4,350.78, the amount in controversy; that under defendant's 1946 compensation plan, plaintiff was entitled to his base salary and expenses, 10% of his annual salary as a fixed bonus for reaching his base dollar quota of merchandise, and additional bonuses of 2-1/2% of the first $30,000 sold in excess of the base and 3% on all additional merchandise sold; that plaintiff was to be credited with all merchandise sold in Cook County, Illinois, and Lake County, Indiana, his territory; that in June, 1946, defendant wrote plaintiff that he would recall conferences in previous February and March when he was advised that defendant was not sure how the 1946 compensation plan would operate; that it had come to the conclusion that the plan would have to be revised effective July 1, 1946; that it had become necessary to establish a ceiling on the "dollar amount of commissionable merchandise" in each territory to obviate any

inequalities among salesmen; that ceiling upon merchandise sold by plaintiff for 1946 was $337,000; that it hoped no further revision would be necessary and asked plaintiff to acknowledge receipt of the letter and his agreement to continue employment under the revision by signing and returning the letter; that at the bottom of the letter was the notation, "The foregoing is hereby agreed to"; and that this notation was dated June 24, 1946, and signed by plaintiff.

It further appears that defendant's manager on January 2, 1946, told plaintiff, "The company is satisfied with your record and we want you to stay with us for the year 1946, we have a new compensation plan for the year 1946 covering you and other salesmen"; that plaintiff had been with defendant four years at that time, and each year a different compensation plan had been in effect; that when plaintiff was given the written compensation plan, he told the manager, "I am very satisfied with this plan and am happy to accept and work under it for the year 1946"; that on January 2, 1947, defendant gave plaintiff a detailed statement of his account, setting forth the amount of his sales and the amount of commission computed by defendant, and after deduction for withholding tax and other deductions it showed a balance due plaintiff of $1,718.82, for which a check was issued by defendant, received by plaintiff and deposited by him. However, the evidence further shows that at the time plaintiff received this check, he stated that he thought he was entitled to more commissions, due to the fact that his sales were so high.

The primary question presented on this appeal is whether the memorandum of June 20, 1946, which plaintiff accepted in writing, was a modification of the compensation plan previously entered into for the year 1946. We think the evidence clearly establishes a contract for the year 1946 that was not terminable at will. The memorandum of June 20, 1946, prepared by defendant, and which should be construed most strongly against it (Cedar Park Cemetery Ass'n v. Village of Calumet Park, 398 Ill. 324, 333; Knowles Foundry & Machine Co. v. National Plate Glass Co., 301 Ill. App. 128, 167), did not limit the bonus payment for the year 1946. Had the parties intended to fix the limit for the bonus commission to be paid for the year 1946, they could readily have expressed in simple language such intention in the memorandum of June 20, 1946.

It appears clearly from the evidence that during the period prior to 1946, there was difficulty in supplying the merchandise to cover the sales made. The allocation of merchandise to the territories of some salesmen was greater than to the territories of the others. To prevent such inequality in the distribution of the merchandise for the year 1946, defendant fixed a quota of merchandise for plaintiff's territory. Such a quota, in itself, did not modify the bonus commission on the merchandise actually sold by plaintiff for the year 1946. The amount of merchandise sold by plaintiff in his territory for the year 1946 is undisputed. We cannot say that the verdict of the jury is against the manifest weight of the evidence.

There was no cross-appeal from the judgment on the counterclaim. It would have been more appropriate had the court entered a judgment upon the verdict of the jury for $2,815.27, which is all, upon both verdicts of the jury, plaintiff is entitled to recover. We so held in Apex Motor Fuel Co. v. Stiglitz, 348 Ill. App. 123. The execution to be issued in favor of plaintiff should be for the sum of $2,815.27 plus costs. The Circuit Court should order the judgment on the counterclaim satisfied of record.

Defendant argues that the receipt of the statement and the acceptance of the check by plaintiff constituted accord and satisfaction. In Hennecke v. Warp, 347 Ill. App. 425, we restated the rule in Obermeyer v. Wisconsin Dairy Farms Co., 199 Ill. App. 568, 570, and cases there cited:

> "It has been held many times that to constitute an accord and satisfaction there must be an honest dispute between the parties, a tender with the explicit understanding of both parties that it was in full payment of all demands, and an acceptance by the creditor with the understanding that the tender is accepted in full payment. Farmers and Mechanics Life Ass'n v. Caine, 224 Ill. 606; Snow v. Griesheimer, 220 Ill. 109; Western Union R. Co. v. Smith, 75 Ill. 496 * * *."

The evidence in the instant case does not establish accord and satisfaction.

We find no reversible error in the refusal of the court to give the instructions tendered by defendant on the question of accord and satisfaction. The instruction given on behalf of plaintiff correctly stated the law in respect to it.

The judgment is affirmed.

AFFIRMED.

KILEY AND LEWE, JJ. CONCUR.

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3883

APPELLATE COURT
STATE OF ILLINOIS
FOURTH DISTRICT

October Term, A. D. 1953.

Term No. 53-0-14. Agenda No. 11

ANDREW WATTS, Plaintiff-Appellee,	)	
-v-	)	Appeal from the County Court of St. Clair County, Illinois.
STAUNTON LUMBER COMPANY, INCORPORATED, Defendant-Appellant.	)	

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11 I.A.2d 224

BARDENS, J.

This is an action by the owner of a parked vehicle against the defendant lumber company for property damage resulting when defendant's truck ran into plaintiff's car. This appeal is taken by defendant from a judgment for plaintiff rendered in the County Court of St. Clair County after a jury found the issues for plaintiff. Timely motions by the defendant for a directed verdict and for judgment notwithstanding the verdict were overruled by the trial court.

Defendant supplies sawdust to a large packing house which it hauls into East St. Louis from saw mills in neighboring area. The uncontradicted evidence is that these deliveries are made only on week days. The accident

occurred some time between midnight and 1:00 A. M. on a Saturday morning, the truck being driven by an employee who had been hired on the previous day. The driver was given special authority to use the truck from 8:00 to 12:00 Saturday morning, to load the truck and return it to the yard for Monday delivery to the packing house. On Friday evening, the truck was returned to the defendant's yard at the close of the work day. However, the driver was given the key to the truck because defendant's manager did not intend to be at the yard at 8:00 A. M. the following morning. There was no evidence as to when the driver took the truck from defendant's garage prior to the accident. All of the above facts were established by testimony of defendant's manager.

Plaintiff bases its case on the presumption of agency arising from proof of the defendant's ownership of the truck. HOWARD v. AMERSON, 236 Ill. App. 587, 593. While the testimony of defendant's manager clearly negatives any such presumption, plaintiff contends that the presumption cannot be rebutted by this type of self-serving testimony. However, it is apparent that such argument is concerned with the credibility of the witness and the weight to be given his testimony. We have been cited to no authority holding an alleged employer's or principal's testimony to be incompetent. Therefore, the defendant's manager's testimony standing alone and uncontradicted constitutes not only the manifest weight of the evidence but the only evidence on the point of agency

and unequivocally refutes such relationship. It is axiomatic that liability of an employer for the act of an employee must be determined from a factual analysis of whether the tortious act occurred within the scope of the employment. SWANBECK v. HUBBARD, 336 Ill. App. 384, 84 N.E. (2d) 159. We find the record barren of any affirmative evidence in any way showing that the driver was performing duties connected with his employment at the time of the collision.

We, therefore, conclude that the Lower Court erred in its ruling on defendant's motion for a directed verdict and the judgment entered below is therefore reversed.

Judgment reversed.

Scheineman, P. J. and Culbertson, J. concur.

Publish in abstract form.

General No. 10712 Agenda No. 14

In The

APPELLATE COURT OF ILLINOIS

Second District,

October Term, A. D. 1953.

SADIE LEE LESTER, Plaintiff-Appellee, vs. MONICA ELEVATOR COMPANY, a corporation. Defendant-Appellant.	Appeal from the Circuit Court of Peoria County, Illinois

Dove, J.

Sadie Lee Lester brought this action against Monica Elevator Company, a corporation, to recover damages sustained by the plaintiff which were caused by water flooding the basement of her home. Trial was had before a jury, which returned a verdict in favor of the plaintiff in the sum of $1275.00. Defendant's motions for a new trial and for judgment notwithstanding the verdict were overruled and judgment was entered in favor of the plaintiff upon the verdict of the jury and the defendant appeals.

Decided Jan. 1921.

In The

Supreme Court of Florida.

October Term, A. D. 1921.

HADIE VAN ZANDT,

Plaintiff-appellee,

vs.

Appeal from the Circuit Court of Duval County.

Defendant-appellant.

Brief of Appellee.

Dove, J.

Hadie Van Zandt brought suit against Jacob Dodgson, a complainant, in trespass on the case, alleging that the defendant had wrongfully and without cause, sued out a writ of attachment against the property of the plaintiff in the hands of third persons, and had caused the property to be levied upon, and for damages sustained by reason of the plaintiff being deprived of the use of said property, and for injury to his credit and business standing. The defendant filed a plea of the plaintiff in the suit against the defendant in the attachment suit, the court sustained the demurrer to the plea, and the defendant appealed.

The complaint alleged that the plaintiff was the owner of certain described premised in the Village of Monica improved by a residence where she resided: that the defendant was the owner of certain described premises upon which a grain elevator was located and which was about 400 feet south of the plaintiff's property; that the defendant was also the owner of a commercial building located on its premises about 100 feet east of plaintiff's property; that there was an under-ground tile drain known as the "Old Tile Drain" located under plaintiff's premises and which was connected with the grain elevator of the defendant, which underground tile drain had been constructed many years ago; that in the year 1948 defendant constructed another underground tile drain designated as the "New Tile Drain" and that this new tile drain was connected with the commercial building of the defendant and with the Old Tile Drain; that early in the year 1950 the defendant connected the roof water drainage system of its commercial building to a cistern located upon its premises and also with the overflow drainage opening from the cistern to the new tile drain; that early in the year 1950 the defendant connected the overflow opening from a septic tank located upon its premises to the new tile drain; that as a result of connecting said septic tank and said overflow drainage and said roof water drainage to the new tile drain and the old tile drain, water and sewage were drained by the defendant through the new tile drain and into the old tile drain and in, around and under the basement of the plaintiff's house, which drainage caused the walls and foundation of her house to crack and be otherwise damaged; that the defendant's conduct, in connecting the new tile drain with the old tile drain was without the permission or

consent or agreement of the plaintiff; that defendant had no authority from the plaintiff, or from the plaintiff's predecessors in title, to so use the old tile drain and that even if plaintiff did have a right to so connect said two drains, the manner of connecting the old and new tile drains was unlawful and in violation of plaintiff's rights and to her damage.

By its answer the defendant admitted many of the allegations of the complaint, but alleged, however, that the connections which it made between its buildings and the new tile drain and the old tile drain were made by virtue of a right which had ripened into an easement under the Statute of Limitations of the State of Illinois and, therefore, that the connections were lawful and permissible. By its answer it denied that the water in the plaintiff's basement was due to any overflowing resulting from the connection of the two drains with its elevator building, commercial building, cistern and septic tank, but alleged that said water in plaintiff's basement was due to seepage resulting from natural rainfall.

The complaint is predicated upon the proposition that the defendant was a trespasser in the use which it made of the drain running under plaintiff's property, or if not a trespasser, that its conduct in making the connections between the two drains and its buildings, cistern and septic tank were wrongful resulting in damage to plaintiff's property. The defense is based on the theory that the defendant possessed an easement to use the old tile drain. The defendant also contends that since the plaintiff failed to reply to the allegations in its answer asserting an easement, she thereby admitted that the defendant had an

easement to use the old tile drain, and, therefore, under the pleadings, plaintiff had no cause of action. In our opinion it was not necessary for the plaintiff to file a reply to the answer inasmuch as she alleged in her complaint that the defendant had no right or authority or agreement to connect the new tile drain with the old tile drain. This allegation negatives the theory of an easement. The parties tried the case upon the theory that the question whether or not the defendant, had an easement was the issue to be submitted to the jury for determination and under the pleadings that question was properly left for the jury to decide. (Drida v. Schmidt, 47 Ill. App. 267, 271.)

The preponderance of evidence discloses that prior to the time the defendant connected the roof water drainage system of the commercial building to the cistern and the cistern with the septic tank and the new tile drain and connected the new tile drain with the old tile drain in the spring of 1950, there had been no water or dampness of any consequence in the plaintiff's basement. The contention of appellant that the water in plaintiff's basement came from rain fall seeping into the basement rather than from the tile drain is not sustained by the evidence. Water tables and other climatological data introduced in evidence by both the plaintiff and defendant showed conclusively that the precipitation in 1951 was no greater, if as great, than it was in several of the years immediately preceeding 1951 and during those years plaintiff had no water in her basement. The ~~xxxx~~ evidence in this record amply supports the verdict of the jury, which found that the water in plaintiff's basement was due to

the drainage connections made by the defendant rather that to any abnormal and excessive rainfall in the spring of 1951.

Since the defendant alleged that it had an easement to use the old tile drain, it had the duty of proving this easement by the greater weight of the evidence. (Rush v. Collins, 366 Ill. 307, 315.) The drain in question was an invisible underground tile and the evidence is that the plaintiff did not know that the drain ran under her property at the time she purchased it. Since the plaintiff did not know of its existence, its use by the defendant was made without her knowledge and there is no proof by the defendant that its use was adverse and hostile to the plaintiff. In Murtha v. O'Heron, 178 Ill. App. 347 at 354, the Court, in commenting upon an underground sewer or drain pipe said "But the drain was underground and there is no proof that the user was adverse or visible, open or notorious to the plaintiff or her immediate predcessors in title. The authorities declare that in such a case of an invisible and unknown drain no prescriptive title arises." (citing cases) In the instant case defendant made no effort to prove that its use of the old tile drain was adverse or hostile to the rights of the plaintiff.

If it be assumed that the defendant was acting within its rights in using the old tile drain, it does not follow that this right to so use this old drain could be transfered to a different building and on a different tract of land and for different purposes as was done by the defendant when it connected the drainage system of the commercial building, the septic tank and the cistern with the new tile drain and the new tile drain with

the old tile drain. In Miller v. Weingart, 317 Ill. 179, at 183, the Court said: "The law is well settled that an easement that is appurtenant to one lot or tract cannot be used in connection with another lot or tract, although the other lot or tract belongs to the owner of the dominant estate to which the easement is appurtenant and although the two tracts or lots join".

It is our conclusion that the defendant had no right to connect the drainage system of the commercial building, the ~~cistern and the septic system of the commercial building, the~~ cistern and the septic tank with the new tile drain and the new tile drain with the old tile drain which ran under the plaintiff's premises and thus over-burden this drain and that when it did so it became liable for any damages which proximately resulted from such conduct. (Farmers Grain & Supply Co. v. Toledo, Peoria & Western Railroad, 316, Ill. App. 116, 128.)

We find no reversible error in this record and the judgment of the trial court is, therefore affirmed.

Judgment Affirmed.

3823A

Abstract

General No. 10729 Agenda No. 23

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT,

OCTOBER TERM, A. D. 1953

S. LAWRENCE McHARD, CORA McHARD, ED VANCE, BOB VANCE, PAUL E. VANCE, HOWARD V. RILEY, F. MILFORD RILEY, and RILEY OIL CO., an Illinois Corporation, Plaintiffs-Appellees, vs. GIBB MOTORS, INC., and HAUS GIBB, Defendants-Appellants.	Appeal from Circuit Court, Kane County.

1 I.A.2d 225

Dove, J.

The Circuit Court of Kane County, at the instance of the plaintiffs, S. Lawrence McHard, Cora McHard, Ed Vance, Bob Vance, Paul E. Vance, Donald Vance, Howard V. Riley, F. Milford Riley and Riley Oil Co., an Illinois corporation, entered an order granting a temporary injunction against the defendants- Gibb Motors, Inc. and Haus Gibb. The defendants filed a motion to dissolve this temporary injunction on the grounds that it had been issued without notice and without bond and that the complaint upon which the injunction was predicated disclosed a point of equity on its face. The chancellor denied the motion to dissolve and this appeal by the defendants followed.

In their complaint for an injunction, the plaintiffs alleged that they were the owners of certain parcels of real estate which constituted the south 60 feet of Block 3 in the City of Blado, Mercer County, Illinois, and that the defendants, or one of them, were the lessees of property lying north of the property of the plaintiffs; that the defendant [illegible] is an agent of employee of Gibbs' Motors, Inc. and that the defendants conduct an automobile sales and repair business on the premises they lease and which lie immediately north of the property owned by the plaintiffs; that the property owned by the plaintiffs, and which is described in the complaint, lies on the north side of East 5th Street between South Maple and South Spruce streets in the City of Blado and that the buildings located on said property face East 5th Street and are commercial and business properties.

The complaint then alleged that for more than twenty years last past members of the public generally and the personal owners and their lessees and their predecessors in title and interest have used a strip of land [illegible] feet in width lying immediately north of the north line of the plaintiffs' premises and extending east and west from South Spruce Street to South Maple Street as a public way, street or alley and have for more than twenty years passed over and along said strip of land notoriously and openly and with a claim of title adversely to all the world and there has been created thereby over and along said strip of land a public way, street or alley by prescription; that notwithstanding such right in the public and the plaintiffs, the defendants have erected a wooden barrier at

the east end of said strip, which barrier prevents vehicular traffic from using said twenty foot strip, and have parked and placed, or have caused to be parked and placed, trucks and automobiles in positions preventing its use by the public as a thoroughfare.

It is further alleged that the plaintiffs' properties which abut on said strip of land consist of business and commercial buildings and that the use of said strip is necessary to provide deliveries and calls to the property for commercial purposes; that such deliveries and calls cannot be made to the front side of the property, because the grade of said lot slopes down to the State of Illinois public highway; that ingress to and from the plaintiffs' property by means of said twenty foot strip is necessary to the maintenance of the commercial value of the plaintiffs' properties; that the plaintiffs are without an adequate remedy in law and that continued possession of said strip of land by the defendants will result in irreparable damage to plaintiffs. The prayer of the complaint was that the defendants be enjoined from taking any action to interfere with the public's use of said twenty foot strip of land and for a temporary injunction requiring the defendants to remove the obstructions and the cars and trucks stored or parked in the way, street or alley.

Plaintiffs filed their complaint on July 22, 1957. Two days later, they filed their motion for a temporary injunction without notice or bond and supported this motion with two affidavits. One affidavit was by Plaintiff R. Lawrence Redford and the other was by Plaintiff Ed Vance. Redford's affidavit sets forth that he and his wife are the owners of certain property as alleged and described in the complaint, which said property

is improved with a two story building, the ground floor of which is used for commercial purposes and the second floor for apartments and the west half of the property is leased for the operation of a retail floral business. The affidavit further recites that the defendants are in possession of the property which they occupy and which is described in the complaint, under a lease from the Chicago, Burlington and Quincy Railroad and that defendants operated thereon an automobile sales and repair business; that there is a twenty foot public alley lying immediately north of his property, which said public alley was for at least twenty-eight years last past been used by the public for a public way, street or alley, openly, visibly and continuously. He further states that in the days immediately preceding the filing of the bill for an injunction and this affidavit the defendants erected a wooden barrier about four feet in height across the eastern end of the alley which prevents ingress and egress to said alley at that end and that the defendants have parked automobiles and trucks in the alley to prevent passage through the alley by plaintiffs and the public and that the Defendant Rufus Gibbs has made statements to the effect that he believes that the public had no prescriptive right in said alley and that he will use the alley for his own purposes and to the exclusion of the public. He also states further in his affidavit that his property abuts on the South upon a sidewalk which is adjacent to Illinois State Highway 17 and that there is not enough space in said highway for trucks to make commercial deliveries to affiant's lessees and that the alley is needed by affiant and the other plaintiffs so that they may make use of

their properties and that affiant's lessees have told him that they will not renew their leases on their properties if they cannot use the alley; that the blocking of the alley prevents the fire department from entering the alley to control fires that might break out there and also prevents policemen from driving through the alley in the course of their duties.

The Affidavit concludes by stating that the plaintiffs' rights will be unduly prejudiced and that they will be subject to great damage if the injunction prayed for in the complaint is not issued at once and without notice.

Aside from the personal attacks involved, the plaintiff Ed Vance's affidavit was practically the same as Nelson's. On July 24, without notice and without bond, the court entered an order granting the prayer of the motion for a temporary injunction.

Section 3 of the Injunction Act (Section 3, Chapter 69, Ill. Rev. Stats.) is as follows: "No court or judge shall grant an injunction without previous notice of the time and place of the application having been given to the defendants to be affected thereby, or such of them as can conveniently be served, unless it appears from the complaint or affidavit accompanying the same, that the rights of the plaintiff will be unduly prejudiced if the injunction is not issued immediately or without notice". This statute makes it clear that no injunction should issue without previous notice of the time and place of the application therefore unless such facts are presented as to make it appear that unless the injunction is issued immediately and without notice irreparable damage will

result. Obviously, as said in [illegible] v. [illegible], 342 Ill. App. 435 at pages 441-2, two possible factual situations are contemplated by the statute; first, the facts alleged may show that even a slight delay will cause injury or prejudice so that action must be taken immediately, or, second, that the giving of notice may defeat the purpose of the suit. A temporary injunction should be issued with caution. It should never be issued without notice unless it clearly appears from the facts stated that the case is within the statutory exception. (Brown, et al, v. City of Sullivan, 330, Ill. App. 400; City of Edwardsville v. [illegible] Railroad Co., 350 Ill. App. 63; [illegible] v. Veterans of Foreign Wars, 343 Ill. App. 271).

The allegations of the complaint and the statements contained in the two affidavits in support of the motion for the temporary injunction must be tested in the light of the foregoing authorities to see if they warranted the issuance of the temporary injunction without notice. Neither the complaint nor the affidavits contained any evidence or allegation as to when the barrier blocking the alley was erected, nor as to when the cars or trucks were parked in the alley so as to obstruct it. The affidavits contained merely the statements, that in the days immediately preceding the filing of this affidavit and the filing of the complaint herein, the defendants have by their own actions erected a wooden barrier across the eastern end of said alley and have parked automobiles and trucks in said alley in order to prevent use of said alley by the public and plaintiffs. Apparently this blocking of the purported alley had been going on for at least a few days before the complaint for injunction was

filed. It is also noted that the motion for a temporary injunction was not filed until two days after the complaint for the injunction was filed, which fact strongly militates against the urgency of the situation, for it does not appear that the conditions existing in the alley were any different when the motion for a temporary injunction was filed on July 24 than they were when the complaint was filed on July 17. It is stated in the affidavit that the lessees of certain plaintiffs have expressed their intention not to renew their leases if the alley is blocked. No time is given as to when the leases will not be renewed or as to when the leases expire. Nothing is stated from which it appears that the leases will expire in the near future. The statement in the affidavit that the blocking of the alley creates a fire and a police hazard are too indefinite and too much in the nature of a conclusion to warrant the action taken. Since under the law we are not permitted to indulge in any presumptions or inferences in favor of granting the temporary writ, we are compelled to hold that it was improvidently issued. There is nothing in this record to show why it could not have been practical to serve notice on the defendants before the injunction was issued. The defendants had a right to controvert the allegations of the complaint and the statements made in the affidavit and they should have been given an opportunity to do so. In Prim v. Craig, 135 Ill. App. 301 at 306 the rule to be followed before a temporary injunction is issued without notice was announced in this language: "This court has spoken many times in no uncertain voice in condemnation of the practice

of granting an injunction without notice unless it is made clearly and indisputably to appear from facts recited and verified, that the rights of the complainant will be unduly prejudiced unless the same be granted without notice. No presumptions are to be indulged in favor of action without notice but the parties must, in fact, allege and show to, bring themselves within the exception of the statute before being entitled to an injunction without notice. Failing to do so, an injunction granted will be held to be improvident and dissolved."

Lastly, it is contended by the defendants that the motion to dissolve the temporary injunction which challenged the complaint on its face for want of equity, as was done in this case, waives any irregularities in the issuance of the temporary injunction without notice or bond. There is language in some of the decisions of this court that lend support to this proposition. However, we believe, that the true rule is set forth in Stenzel v. Yates, 341 Ill. App. 435 at page 442, where the court said: "The modern rule is that the lack of compliance with the statute on notice may be urged on motion to dissolve the injunction, without the necessity of limiting the appearance, and it may be presented alone or in connection with other grounds. . . . .Hessie v. Calcott, 305 Ill. App. 627; Wagner v. Omer, 306 Ill. App.601." We therefore hold that the motion to dissolve the temporary injunction did not waive any irregularities in the issuance of the temporary injunction without notice or bond simply because it also challenged the complaint for want of equity.

Where a temporary injunction is issued without notice in a case where notice should have been given, it is the duty of this court, without reference to the merits of the cause, to reverse the order denying the motion to dissolve the injunction on that ground (Brown Music Co. v. City of Gulliver, 350 Ill. App. 400, 404).

The Circuit Court of Marion County erred in issuing the temporary injunction without notice and should have allowed defendants' motion to dissolve the same. The order of that court is therefore reversed and the cause is remanded with directions to allow the motion to dissolve the temporary injunction and to dissolve the rule.

Reversed and Remanded.

Gen. No. 10711 Agenda No. 13.

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT.

OCTOBER TERM, A. D. 1953.

HARRY D. LUCAS, Appellant, vs. FREDERICK E. HAMBRECHT, M. D., Appellee.	Appeal from the Circuit Court of Knox County.

WOLFE,-- J.

On April 30, 1948, Harry D. Lucas filed a complaint in the Circuit Court of Knox County, Illinois, against Frederick E. Hambrecht, M. D. in which he alleges he employed the defendant as a physician and surgeon to treat him professionally for rectal bleeding and gastro-intestinal ailments; that the doctor decided to and did perform an exploratory operation on plaintiff to locate the trouble; that after the operation the bandages were removed and it was found that the wound had not healed, and he was again taken to the operating room and the wounds resutured; that the doctor informed him that his blood count was low and it was necessary for him to have blood transfusions; that these were administered to the patient; that the incision again broke open when the bandages were removed and it was necessary to

resuture them the third time; that the defendant continued to treat the plaintiff for about thirty days after this operation in which time he then informed the plaintiff that he would not continue to treat him; that after he was discharged by the defendant, plaintiff began to have pains in his abdomen and secured the services of another physician and was operated on by him in the Wesley Memorial Hospital in Chicago for the removal of pieces of metal and for a ventral hernia condition.

It is charged in Paragraph 8 of the complaint that the defendant did not use due and reasonable or proper care or skill in an endeavor to cure or treat the plaintiff in the following particulars: "(a) That the defendant did not use reasonable care or skill in treating the plaintiff following the exploratory operation. (b) That defendant was negligent in not properly suturing the incision following the exploratory operation. (c) That defendant was negligent in leaving pieces of metal wire along both sides of the abdominal scar. (d) That defendant was negligent in allowing said pieces of wire to remain in plaintiff's body with the ends of said wire uncurled or improperly secured. (e) That the defendant did not use reasonable care and skill in rendering post-operative treatment to plaintiff, discharging the plaintiff before plaintiff was cured. (f) That defendant knew or should have known by post-operative treatment that the exploratory operation upon the plaintiff had resulted in a ventral hernia and that the defendant was negligent in discharging the plaintiff from his care and treatment in such condition."

The plaintiff claims that at all times heretofore mentioned he was in the exercise of due care and caution for his own safety. That by reason of the lack of skill or unreasonable care, the plaintiff suffered great anguish and distress, and that he had been damaged to the extent of $100,000.

The defendant filed his answer and denied all of the allegations in the complaint in which it is charged he was negligent, and specifically denied Paragraph 8 in which the acts of negligence and unskilfulness were charged in the complaint. In addition to the above answer he specially pleaded four releases signed by the plaintiff in which he released the defendant from all claims of any kind and nature that he might have against him as a result of said operations.

The first release is as follows: "I, the undersigned, Mr. Harry Lucas, a patient at the Galesburg Cottage Hospital, hereby certify that I have full knowledge of the operation about to be performed on me under the direction of Dr. Hambrecht; that I have given and do hereby give my express consent thereto and in consideration of the performance of the said operation by said doctor, and in further consideration of the facilities therefor granted me by the Galesburg Cottage Hospital, I, the undersigned, do hereby release the said Dr. Hambrecht and the said Galesburg Cottage Hospital from any and all claim of any kind and nature that I may now have or that I might have against them, or either of them, at any time hereafter as the result of this said operation.

(s) Harry Lucas (Seal)

Witnessed by
B. Ottoson,
Virginia L. Clay."

The plaintiff states that at all times hereinafter
mentioned he was in the exercise of due care and caution for
his own safety. Then by reason of the lack of skill or negligence
also cause, the plaintiff without cause suffered the distress, and
took to and have damaged to the extent of $10,000.

The defendant files his answer and denies all of the
allegations in the complaint in which it is known to be untrue
and specifically denied therefore. In order the sum of
mentioned and qualifications were answered in his complaint. In
addition to the above answer is specially pleaded that damages
alleged by the plaintiff to have been received the defendant from
all claims of any kind and nature that is right now pending in
as a result of said operations.

The first witness is as follows: Mr. Ben Cunningham.
Mr. Carr Lewis, a member of the defendant company testified,
briefly verbally that I have full knowledge of the operations
to be performed on the under the direction of me. Therefore that
I have given and do hereby give my express consent herein and
in consideration of the performance of this well operation by
said company, and in further consideration of the facilities
therefor granted me by the following certain instruments, i. the
undersigned, do hereby release the said to. Company for the
said defendant Company herein from any and all claim of any
kind and nature that I may have or have I ever have against
them, on account of them, of any loss sustained on the premises
this said operation.

(s) Mary Lewis (seal)

Witnessed by
J. Jackson,
Timothy L. Clay.

This release was signed on May 2, 1946. On May 6, 1946, an identical release was signed except with different witnesses. On May the 10th an identical release was signed by Lucas, but witnessed by different witnesses. On May the 7th, the following release was signed by Lucas: "I, the undersigned, Mr. Harry Lucas, patient of Dr. Fred Hambrecht's at the Galesburg Cottage Hospital, hereby release the said doctor and hospital from responsibility of removing the blocks from the foot of my bed, knowing my condition and that I am going against the doctor's orders." This was signed by Harry Lucas and witnessed by two witnesses.

The case was tried before the Court without a jury and at the conclusion of the evidence, the defendant entered a motion for a finding in his favor, as against the plaintiff. This motion was taken under advisement by the Judge and later he sustained the motion and found the issues in favor of the defendant and dismissed plaintiff's suit and entered judgment against him for costs. It is from this judgment that the plaintiff has perfected an appeal to this Court.

The trial court filed a written opinion in the case in which he held that the releases signed by the plaintiff were a bar to his action, but he did not pass upon the evidence in the case. Part of his opinion is as follows: "In 70 C.J.S. Page 982, Par. 58, it is said: "It has been asserted that a physician or surgeon may perhaps protect himself from liability for malpractice by a special contract that he shall not be so liable." Cited in support of this text is Nelson v. Harrington, 40 N. W. 228 (Wisc.), where the above statement appears by way of dictum.

This release was signed on Jan. 2, 1943. On Jan. 4, 1943, an identical release was signed again with different witnesses. On May the 1943 an identical release was signed by Loomis, but witnessed by different witnesses. On May the 17th, the following release was signed by Loomis: "I, the undersigned, Mr. Henry Loomis, patient of Dr. Reed [illegible] Hospital), hereby release the said doctor and hospital from responsibility of reporting any claims upon the fact of me being [illegible] my condition and that I am going against the doctor's orders." This was signed by Henry Loomis and witnessed by two witnesses.

The case was tried before the court without a jury and at the conclusion of the evidence, the defendant moved a motion for a finding in his favor, by reason of the releases. This motion was taken under advisement by the court, and then it overruled the motion, and found the issues in favor of the defendant and dismissed plaintiff's suit and entered judgment against him for the costs. It is from this judgment that the plaintiff has perfected an appeal to this Court.

The trial court filed a written opinion in the case in which he held that the releases signed by the plaintiff were a bar to his action, but he did not pass upon the evidence in the case. Part of the opinion is as follows: "In 79 A.L.R. [illegible], Sec. [illegible], it is said: 'It has been asserted that a physician or surgeon may validly contract himself from liability for malpractice by a special contract with the patient [illegible].' Cited in support of that text is [illegible], 220 (Plac.), where the court sustained release by way of dictum.

A rather diligent search has failed to reveal any reported case specifically involving the validity of such a release as between physician and patient.

"In Zeigler v. Illinois Trust & Savings Bank, 245 Ill. 180, it is held that a contract between physician and patient is not against public policy when it appears that the transaction was voluntarily and deliberately entered into knowing its nature and that consent was not obtained by reason of duress or fraud. The execution and delivery of these releases is admitted. Plaintiff testified on direct examination to having signed them and to being informed or knowing that they were releases of the hospital and doctor. Plaintiff was a man of intelligence, able to read and understand the import of the documents to which he appended his signature. Nowhere in the testimony is there any indication of any mental or physical condition that would prevent him from doing so. The law imposed upon him the duty to inform himself as to what he was signing. There is no contention that defendant practiced any fraud or deception in procuring his signature to the releases."

In the above statement of the trial Judge it will be noted that he stated that plaintiff knew the papers he was signing were releases of the hospital and the doctor; that the plaintiff was a man of intelligence and able to read and understand the import of the releases to which he appended his signature. The trial court had the opportunity of seeing and hearing the witnesses as they testified and he had an opportunity to judge the intelligence of the witnesses.

Several cases are cited by appellant in which he claims that an exculpatory contract which attempts to relieve the defendant of liability for his own negligence in the case at bar is void, as against public policy, and that the releases in the case at bar do not, by their terms, relieve the defendant of liability from negligence. The cases cited are generally controlled by some statutory requirement, but our Supreme Court in the case of Jackson vs. The First National Bank of Lake Forrest, 415 Ill. Page 453, had presented to it a similar question in regard to a landlord specifying in its lease to its tenant that the tenant released any and all liability against the landlord for injuries that the tenant might receive by the failure of the lessor to keep the premises in repair. The first syllabus is as follows: "Contracts by which one seeks to relieve himself from the consequences of his own negligence arising out of a certain relationship to another are generally enforced unless it would be against the settled public policy of the State to do so, or there is something in the social relationship of the parties militating against upholding the agreement. An exculpatory clause in a lease specifically or generally providing that the lessor shall not be liable for damages or injuries to the lessee or his property from all or certain causes is not against public policy but is valid and enforcible, there being nothing in the lessor-lessee relationship which in and of itself militates against the validity of such agreements, but such agreements relate to the private business of the parties and are not a matter of public concern, and it cannot be said that there is a disparity of bargaining power between the parties to such agreements."

Neither the appellant nor the appellee has been able to cite any authority where this exact question has been presented to any court of review. The nearest is the case of Nelson vs. Harrington, 40 Northwestern 228. This suit was a case of a patient suing a doctor for malpractice and it is there stated: "It has been asserted that a physician or surgeon may perhaps protect himself from liability for malpractice by a special contract that he shall not be so liable."

The reply to the defendant's answer that the plaintiff by signing the four releases in question had released the defendant from all liability on account of the various operations, alleged that the releases were not read to the plaintiff and at the time that he executed them he was not mentally competent to comprehend the import of the same. The evidence of the plaintiff does not support this contention. The record shows that he testified that he knew that he was releasing the doctor from liability when he signed them. The releases themselves are short and in the ordinary plain print. By his stating that he knew the contents of the same, he is bound by them. His evidence shows that there was no compulsion on the part of the doctor, or the hospital authorities for him to sign them and we think the Court properly found that he had released the doctor from all liability concerning his operations.

As before stated the trial court did not pass on the merits of the controversy, but decided the case wholly upon the releases. It is argued by the appellee and sustained by authority that a judgment must be affirmed if the facts presented by the record justified it, irrespective of the reason given for that judgment by the trial court.

Olander v. Johnson, 258 Ill. App. Page 89, was a case of malpractice and after reviewing many cases both Appellate and Supreme Courts of Illinois, we stated the law governing such cases as follows: "The duty which a physician and surgeon owes his patient is to bring to the case at hand that degree of knowledge, skill, and care which a good physician and surgeon would bring to a similar case under like circumstances. While this rule, on the one hand, does not exact the highest degree of skill and proficiency attainable in the profession, it does not contemplate merely average merit. * * * To this extent he is liable and no further. He is not required to possess the highest, but reasonable skill. The burden of proof is upon the plaintiff in an action for malpractice to show the want of such care, skill, and diligence and also to show that the injury complained of resulted from failure to exercise those requisites. * * *

"Negligence is always a question of fact that must be alleged and proved as averred. It cannot be supported by a mere conjecture or surmise, but must be made referable to some specific cause or defect. * * *

"Before a plaintiff can recover in a malpractice case, it must be shown by affirmative evidence, first, that defendant was unskilful and negligent, and second, that his want of skill and care caused injury to the plaintiff. If either element is lacking in the proof, no case is presented for the consideration of a jury. * * *

"Mere conjecture or supposition should not be sufficient to overcome the presumption in favor of the attending physician.

Alleged negligence and resulting injury must be proved as averred. A physician is not an insurer. * * * Proof of a bad result or of a mishap is of itself no evidence of negligence or lack of skill. * * *

"The doctrine of res ipsa loquitur is not applicable to situations like the case at bar * * * for unless the accident or injury sustained by the plaintiff bespeaks the defendant's wrong, there is no proof of culpable negligence.

"As a general rule, there must be expert testimony to show that a bad result was caused by the alleged unskilful or negligent act." (Citation of cases in the above quotation are omitted.)

The plaintiff called Doctor O. H. Horrall, who qualified as a physician and surgeon and who later in 1947 and 1949 performed two operations on the plaintiff in the City of Chicago. He testified that he removed wire sutures from the abdomen of the plaintiff and they had been causing him considerable discomfort. Also at the time of each of the operations he operated on him for a hernia. The main contention of the plaintiff is that the defendant was negligent in using wire sutures on the plaintiff when he operated upon him. The record shows that the first operation was an exploratory one and the wound did not heal properly. After the second one, the wound did not heal properly and in the third operation wire sutures were used and the wound finally healed. An examination of Doctor Horrall's testimony discloses that in his work as a surgeon in the City of Chicago he only uses wire sutures in certain cases and he

states that in most of the operations that he has seen, the surgeons do not use wire suture, but no place in his testimony does he say that it is not proper practice in some circumstances to use wire sutures. He stated that he had seen wire sutures used in a number of cases; that formerly surgeons used silk for suture, later plain catgut, still later chromic catgut and more recently wire of various types, copper, silver and various other metals; that wire sutures are not experimental or unusual in cancer cases. Because one doctor does not approve of the method used by another, it is not sufficient to prove that the other doctor was guilty of negligence in not using the same kind of sutures that he would have used under similar circumstances. As before stated: Before a plaintiff can recover in a malpractice case, it must be shown by affirmative evidence, first, that defendant was unskilful and negligent, and second, that his want of skill and care caused injury to the plaintiff. The record is bare of any unskilful conduct of the defendant in operating upon the plaintiff. It is stated in the case of Phebus vs. Mather, 181 Ill. App. Page 274: "In an action to recover damages for alleged malpractice in the treatment of an eye, proof that a good result was not obtained is, of itself, no proof or evidence of negligence or lack of skill, but there must be affirmative proof of such negligence or lack of skill and that the injuries complained of resulted therefrom and such proof can only be established by the testimony of experts skilled in the medical profession."

When a doctor operates on a patient he is entitled to reasonable cooperation with his patient. In this case the evidence shows that the plaintiff was uncooperative. He says after

the third operation he and the doctor had a quarrel and the record shows that after one of the operations he had the blocks under the foot of the bed removed, which the doctor thought was the proper treatment. The plaintiff insisted on having those blocks removed and signed a release in which he stated that he knew he was going contrary to the doctor's orders in having them removed. This may have been the main reason that the operation was not as successful as the plaintiff had desired it to be.

He complains about his hernia after the defendant had operated on him the third time; such hernias may be caused, so Doctor Horrall testified, "by getting up too early after an operation, eating too much when he should be on a liquid diet, failure to use rectal tubes to let the gas out, or nausea and vomiting, or a number of things will do it." After Doctor Horrall had operated upon the plaintiff the first time the plaintiff also had a hernia and was treated for it in the second operation.

It is our conclusion that under the facts as presented by the record in this case, the plaintiff has failed to prove his case charging the defendant negligently treated him, and for above reasons the judgment of the trial court is hereby affirmed.

Judgment affirmed.

O/S: 70R N.

3843 A

Abstract

Gen. No. 10715 Agenda No. 16.

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT.

OCTOBER TERM, A. D. 1953.

HELEN RIDGE, Appellee,	)	
vs.	)	Appeal from the Circuit Court of Lee County, Illinois.
JOHN E. RIDGE, Appellant.	)	

11 I.A.2d 226

WOLFE,-- J.

At the January Term 1953 of the Lee County Circuit Court, Helen Ridge procured a divorce on grounds of desertion from her husband, John E. Ridge. The custody of their minor child, John E. Ridge, Jr., was given to his father with rights of reasonable visitation by the mother. The record shows that the complaint for divorce was filed on April 10, 1953, and that John E. Ridge filed his waiver of service and consent to an immediate hearing. He also filed an answer in which he denied that he willfully deserted his wife. On the same day a hearing was had upon the merits of the case, but John E. Ridge did not appear and on the same day a decree of divorce was granted.

On June 8, 1953, Helen Ridge filed a petition in the Circuit Court of Lee County asking that the decree in regard

to the custody of their child be modified so that she would have the right to take the child to her own home for certain periods of time, and during the summer vacation. She alleged in her petition that she could not satisfactorily visit with her son while at the home of her former husband, and that the father of the boy interfered with her rights of visitation. John E. Ridge filed an answer to this petition and denied that he had interfered in any way with the visits between the mother and her son. A hearing was had on July 17, 1953, and Helen Ridge was granted a temporary custody of her child, John E. Ridge, Jr., for July 19, August 2nd and August 16, 1953, between the hours of one o'clock and six o'clock p.m. A decree was entered accordingly and John E. Ridge has perfected an appeal to this Court to reverse this order.

It appears from the record that Helen Ridge, shortly after the divorce was granted, remarried, and now has a home of her own; that at the time of the divorce she had no home and was working to make her living and could not care for her son and she consented at that time that the father have the custody of the child and to waive alimony.

John E. Ridge did not claim that the mother is not a suitable person to have the custody of her son, or that the home which she now has is not suitable to take the boy, while he would be visiting her, but says that she waived her right to the boy at the time of the divorce.

The appellee contends that the order appealed from is not a final or appealable order and that the question raised

on appeal is moot and is therefore not reviewable. A similar question was raised in the case of Schneeman vs. Schneeman, 317 Ill. App. 286, and it was there decided that an order for the custody of a child even though such custody, is to be only partial and temporary is an appealable order. We agree with what was said in this case and hold that the order is appealable and the questions raised are not moot.

The first contention of the appellant is that to warrant modification of the custody provisions of a divorce decree, the party seeking modification must show a change in condition affecting the welfare of the child since the entry of the decree. No doubt this is the law as so stated in Nye vs. Nye, 411 Ill. 408. It is undisputed in this case that John E. Ridge did not contest his wife's divorce action and while he filed an answer in effect, the hearing was a default case. In his evidence he now says that his wife swore falsely in procuring the divorce. It seems that this is a little late to raise this question as he had ample opportunity to defend the case if he had so wished at the time of the hearing. About the only reason that he gives for not wanting the mother of his son to take the child to her own home once in two weeks, is that she is a scatterbrain, as he calls her. Websters dictionary described a scatterbrain as "one incapable of serious or connected thought." In reading the testimony of the plaintiff and the defendant, it seems to us that her testimony is more serious and connected than that of the defendant, and the Court who heard the evidence and saw the witnesses, probably came to that same conclusion before he entered the decree he did.

It is questioned whether the Court has a right to modify the divorce decree. Part of Section 19, Chapter 40, the Divorce act of Illinois Revised Statutes 1953 provides: "The Court may, on application, from time to time, make such alterations in the allowance of alimony and maintenance, and the care, custody and support of the children, as shall appear reasonable and proper." In Stafford vs. Stafford, 299 Ill. 438, the Court stated: "This right to modify the decree as to the custody of the minor child from time to time, as shall appear reasonable and proper, is expressly given by section 18 of our Divorce act, which has been sustained frequently by the decisions of this court." (Draper vs. Draper, 68 Ill. Page 17.)

The law is well stated in regard to the custody of children when their parents are divorced in Kelly vs. Kelly, 317 Ill. Page 104 and is as follows: "While a bill which has for its sole purpose the obtaining of the care and custody of a child cannot be maintained, (Thomas vs. Thomas, 250 Ill. 354,) the Divorce act authorizes the court which has jurisdiction of a suit for divorce to make orders concerning the care and custody of the child or children of the parties during the pendency of the suit or upon final hearing when a divorce is decreed, and this order respecting the care, custody and support of the child or children may be altered from time to time as changed conditions warrant. (Stafford v. Stafford, 299 Ill. 348.) Since the children of divorced parents are often exposed to the mutual animosities and jealousies of their parents and the happiness of the children

and their usefulness as citizens are thereby endangered, it is the established policy of the law of this State to regard such children as wards of the court. The nurture and proper training of the children of divorced parents being matters of vital interest to the State as well as to the children themselves, the legislature has provided that the court granting a divorce shall have full and continuing jurisdiction, during the minority of such children, to make from time to time such orders with respect to their care, custody and support as reason and justice shall require. While the marriage relation may be dissolved and the marital rights and duties thereby brought to an end, the relation of parent and child cannot be destroyed." To the same effect is Williams vs. Williams, 316 Ill. App. 6; Karr vs. Rust, 217 Ill. App. 555.

In the case of Houghland vs. Leonard, 415 Ill. 135, a dispute arose over the custody of a minor child as a jurisdictional matter between the county court and the circuit court, and it is there stated: "It is well settled that while the circuit court initially awarded custody of the child to the petitioner, the jurisdiction of that court continued for the purpose of making, from time to time, such orders relating to the child's care, custody, and support as reason and justice might require." Citing Nye vs. Nye; Kelly vs. Kelly and Stafford vs. Stafford, supra.

It is largely under the discretion of the trial court after he has heard the evidence, to make the proper disposition for the child's care and custody. In the present case the father

testified that the child was going to summer school and was busy practically all the time during the week. The Judge evidently took this matter into consideration because the three days that he ordered the child delivered to the mother were on Sundays, and therefore would not interfere in any way with the child's schooling. The mother now has a suitable home in which she can entertain her own son, and she states that the conditions surrounding her former husband's home, made it undesirable for her to visit her son there. After John E. Ridge swearing that his former wife was a scatterbrain and a perjurer, the conditions surrounding a visit at his home would not be improved.

It is our conclusion that the Court properly found that it was for the best interest of the child that the mother be allowed to take him to her own home on the three days that were designated in the decree, and that the order appealed from should be and is affirmed.

Affirmed.

3853 A

Abstract

Gen. No. 10721 Agenda No. 19.

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT.

OCTOBER TERM, 1953.

ANTHONY SPARACINO, Plaintiff-Appellant, vs. JOE FERONA, Defendant-Appellee.	Appeal from Circuit Court, Winnebago County.

WOLFE,-- J.

Anthony Sparacino filed a suit in the Circuit Court of Winnebago County charging Joe Ferona with false imprisonment and assault and battery. The first, second and fourth counts of the complaint charge that the defendant unlawfully and maliciously restrained the plaintiff of his liberty and detained him in custody without his consent and against his will and without a warrant or other legal process. The third and fifth counts of the complaint charge the defendant unlawfully and maliciously made an assault upon the plaintiff. Each count states specifically what the defendant did. The fifth count also charges that by reason of the assault, the plaintiff was damaged, etc., and asks for exemplary or punitive damages. He asks for a judgment for $100,000.

Dec. 30, 1937. Answer to Q. 1.

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT.

OCTOBER TERM, 1935.

ALBERT BIRKETT, Plaintiff-Appellant, vs. JOY PRODUCT, Defendant-Appellee.	Appeal from Circuit Court, Plaintiff to pay.

NOTE.-- 1.

Anthony Bonifacio (Plaintiff) built in his time in Cook County of Wisconsin during summer, the Spring and Fall, and Winter months and spent all winter. The Brook, across the Fourth County of the Appellant where he was interested commercially and additionally represented the plaintiff of the Library and Cassidy and in County without the consent and against his will and without a warrant or other legal process. The Lake and fifth County of the Appellee where the defendant unlawfully and maliciously made an assault upon the plaintiff. Each count states specifically that the defendant did. The fifth count also charges that by reason of the assault, the plaintiff was injured, etc., and sues the defendant in punitive damages. He sues for a judgment for $100,000.

The defendant filed his motion to dismiss the complaint, which was sustained by the Court and judgment entered against the plaintiff in bar of the action and for costs. It is from this judgment that the appeal is prosecuted to this Court.

The main contention of the defendant is that there are only two causes of action and they should be combined in two counts. We cannot agree with this contention. In an examination of the separate counts each states a cause of action, but in a different manner, and if proven each would entitle the plaintiff to damages.

The Court sustained a motion to strike the original complaint and the second amended complaint was filed. It is argued by the appellee, but it does not appear in the record that the first amended complaint charged that the defendant was a deputy sheriff, and he now insists that each count of the complaint is fatally defective, because it is not alleged that the defendant is a deputy sheriff. To sustain his contention he relies on the case of Povlich vs. Glodich, 311 Ill. 149. An examination of that case discloses that the question was not raised. The case was filed to the February Term 1921 of the Franklin County Circuit Court. In stating the facts of the case, the Court uses this language: "The defendants filed their general demurrer and at the September term, 1921, withdrew the demurrer as to the defendant Glodich, and the plaintiff dismissed the suit as to the defendant Buchanan." So that there was no demurrer for the Court to pass upon, however in the last sentence of the opinion, the Court did say: "It is argued that the declaration did not state a cause of

action, but it was sufficient as against a general demurrer." In the above case it was alleged that neither of the defendants was an officer of the law. We find no case that supports the appellee's contention that it was incumbent upon the plaintiff to allege that the defendant was a deputy sheriff.

If the defendant is a deputy sheriff and acting as such in his legal capacity and made a lawful arrest of the plaintiff, it is a matter for his defense, and it has frequently been so held by our Courts. Haln vs. Ritter, 12 Ill. Page 80; Olsen vs. Upsahl, 69 Ill. 273; Chicago & Western Indiana R. R. Co. vs. Shroeder, etc., 18 Ill. App. 328; Chicago Title and Trust Co., vs. Core, 126 Ill. App. 272.

It is our conclusion that the plaintiff stated a good cause of action in his complaint and the Court erred in sustaining a motion to strike the same and dismiss the suit. The judgment of the Circuit Court is hereby reversed and remanded with directions to overrule the motion to strike and to enter a rule on the defendant to answer the complaint.

Reversed and remanded.

3867 A

Abstract

Gen. No. 10726 Agenda No. 22.

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT.

OCTOBER TERM, A. D. 1953.

JOHN STEELE, Plaintiff-Appellee, vs. MARY STEELE, et al., Defendants-Appellants.	Appeal from the Circuit Court of Marshall County, Illinois.

1 I.A.2d 227

WOLFE,-- J.

Belle Duke owned land in Marshall County and died intestate on June 6, 1953. On June 22, 1953, John Steele an heir of the deceased, filed a partition suit in the Circuit Court of Marshall County for the partition of part of the real estate owned by Belle Duke in her lifetime. Mary Steele, et al., also heirs at law of Belle Duke, filed a counterclaim for the partition of all of the land owned by the decedent at the time of her death and having a common chain of title. Mary Steele was appointed administrator de bonis non of the Estate of Belle Duke by the County Court of Marshall County, Illinois, and qualified as such administrator. John Steele

filed an amended complaint and the defendants filed an answer thereto. In July 1953, Mary Steele and the other defendants representing five-sixths of the parties in interest filed a petition for the appointment of receiver over the lands involved and requested that Walter S. Harrison be appointed. Mr. Harrison had been the general agent and adviser of Belle Duke for a number of years and had handled all of her property continuously for thirty years or more prior to her death. This agency continued to the date of her death. John Steele did not file an answer or assign any reason why he was opposed to the appointment of Walter S. Harrison as such receiver. The defendants introduced evidence to show that Mr. Harrison was competent and reliable, and asked the chancellor to appoint him as such receiver, but the Court refused to appoint Mr. Harrison and appointed Robert A. Barnes the Master in Chancery of the Circuit Court of Marshall County as receiver. It is from this order that the defendants have perfected an appeal to this Court.

It is contended by the appellants that the Court erred in not appointing Walter S. Harrison as such receiver, as five-sixths of the parties in interest requested his appointment, and the evidence shows that Mr. Harrison was thoroughly competent to serve as such receiver and that John Steele gave no reason whatsoever why he was opposed to Mr. Harrison's appointment. The chancellor has a large discretion in whom he shall appoint as receiver in such cases, provided the one he appoints is a competent person to serve as such.

The appellants also claim that the Court erred in appointing Robert A. Barnes receiver, because he was the Master in Chancery

of the Circuit Court in which this case is pending. Mr. Harrison was called as a witness and after he had described his duties as agent for Belle Duke and had stated what he understood the duties of the receiver would be, the Court on commenting upon his testimony stated: "All these matters will come before the master in connection with the shares of the proceeds or the rents of these respective parties in the real estate." The abstract contains the decision of the trial court after the close of the testimony and is as follows: "Circumstances have changed, there are now other parties interested in the property for the first time, and who at the first opportunity objected to Harrison's appointment as administrator. John Steele was not consulted before applying for appointment of Mr. Harrison as administrator, the very fact that the five interests want Harrison is the very thing that would cause John not to want him, and without implication against Harrison because of his ability, if John Steele does not want him, his objection should be considered. The properties are leased I know of no objection to the man I have in mind as to capacity and ability to assume the duties as receiver. I must go outside of the parties and appoint a person who will be interested directly in doing the things that a receiver ought to do, and having due respect for Mr. Harrison's ability and making no implication against him, and with no reflection on the desires of the five-sixths interest, I feel it only fair to treat all alike and not appoint one who is suggested by either side, and I appoint Robert A. Barnes on filing bond."

From a reading of the Court's decision it appears that because John Steele representing one-sixth of the estate objected to Mr. Harrison's appointment, the Court sustained his objection, but he appointed a man as receiver, to whom the owners of the five-sixths interest in the property, are opposed.

The appellants claim that a master in chancery is not a proper party to be appointed receiver. They rely upon the case of Benneson vs. Bill, 62 Ill. 408 as sustaining their position. In the case we find the following: "There is another objection made to the decree, and that is in appointing the master in chancery of the court the receiver, in the event appellant did not act in ninety days. As a general rule, the appointment of a receiver is ordinarily a matter of discretion in the court; but there are persons who, owing to their position, are not usually competent to act as such. A party to a suit is not competent, unless by consent of both parties. Nor is a trustee, for he is the person to see that the receiver performs his duty. The two characters are incompatible; but in a special case he might be appointed, he engaging to act as such without emolument. And this rule is extended to others besides trustees. In Taylor v. Oldham, Jacob R. 527, Lord Eldon held that the son of a next friend, suing for an infant, ought not to be receiver. Now will a man be appointed receiver whose position may cause difficulty in administering justice. A master in chancery was accordingly held disqualified, he being an officer whose duty it was to pass the accounts and check the conduct of a receiver. Kerr on Receivers, ch. 4, pp. 126 to 130."

The appellee in his argument states that the decision in the Benneson case rests entirely upon the antiquated doctrine of the chancery court that has long since lost its basis in fact; that the enlightened doctrines of our present day Courts would not permit the ministerial functions of the Master in Chancery to disqualify a disinterested receiver such as Robert A. Barnes.

The Appellate Court of the Third District of Illinois in 1912 did not agree with the appellee that this was an antiquated doctrine. In the case of Briggs vs. Reynold, 176 Ill. App. 420, the Master in Chancery in Pike County was appointed receiver in a case pending in that county, and the Court in reversing this appointment uses this language: "It is also contended that there is error in the appointment of Edward Doocy as receiver in Illinois. Doocy is the Master in Chancery in Pike County, and one of the complainants. A party to a suit or a <u>master in chancery</u> is not competent to act as receiver; the receiver should be an impartial and indifferent person. Benneson vs. Bill, 62 Ill. 408; Watson vs. Cudney, 144 Ill. App. 624."

It is our conclusion that the trial court erred in appointing Robert A. Barnes as receiver in the present case, as he is disqualified by reason of being Master in Chancery. While it is true that the majority of the interested parties do not necessarily control the appointment of a receiver, their interest should be considered, and as they strenuously object to the appointment of Mr. Barnes, we feel that the case should be reversed and the cause remanded with directions that the Court appoint some other wholly disinterested and qualified person as receiver.

Reversed and remanded with directions.

A

3693

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

October Term, A. D. 1953

Term No. 53 0 7 | Agenda No. 8

ALMA DAVIS and CHARLES DAVIS,	)	
	)	
Plaintiffs-Appellees,	)	Appeal from the
	)	Circuit Court of
vs.	)	St. Clair County,
	)	Illinois.
THOMAS MOORE and CLAIRE MOORE,	)	
	)	
Defendants-Appellants.	)	

11 I.A.2d 206

CULBERTSON, J.

This is an appeal from a judgment in forcible entry and detainer entered in the Circuit Court of St. Clair County in favor of Appellees, ALMA DAVIS and CHARLES DAVIS (hereinafter called plaintiffs), as against Appellants, THOMAS MOORE and CLAIRE MOORE (hereinafter called defendants), for possession of premises described in the complaint, and on plaintiff's motion for summary judgment. Judgment for possession was entered on April 6, 1953. Notice of appeal was filed in the Trial Court on April 24, 1953, more than five days after judgment for possession was entered. The appeal bond was filed in the Trial Court on May 4, 1953. On July 3, 1953, the Trial Court, on motion of plaintiffs, entered an order dismissing the appeal of defendants to the Appellate Court.

The plaintiffs filed an entry of a special appearance and moved to dismiss or strike the appeal, and filed suggestions in support of such motion, to which defendants filed objections. The motion to dismiss the appeal sets forth that, as appears from the transcript of record, a notice of appeal was not filed within five days after the entry of judgment; that the appeal bond was not conditioned as required by Section 20, Chapter 57, 1951 ILLINOIS REVISED STATUTES, and was therefore defective; and that the Court below had entered an order dismissing the appeal, as herein stated. It is pointed out that in Sub-Section 2, of Section 155, Chapter 110, 1951 ILLINOIS REVISED STATUTES, proceedings in forcible entry and detainer, and other actions in which procedure is regulated by special statutes, are required to be in accordance with the statutes dealing therewith; that Rule 2 of the Supreme Court confirms that the special statutes control to the extent that they regulate procedure, but that the Civil Practice Act applies to matters or procedure not regulated by special statute.

Under the Forcible Entry and Detainer Statute (1951 ILLINOIS REVISED STATUTES, Chapter 57, Sections 19, 20 and 21), notice of appeal and bond are

required to be filed within five days of the judgment, and the bond is required to be conditioned so that the appeal would be prosecuted with effect; that regardless of the outcome of the appeal, to pay all rents due before final determination of the suit; and in case the judgment from which the appeal is taken is affirmed or the appeal dismissed, to pay all damages and loss resulting from the withholding of the premises, etc. The bond in the case before us was conditioned only on payment of the amount of judgment, costs, interest, and damages.

The Statutes of this State provide that if defendant appeals in a forcible entry and detainer suit, notice of appeal and the appeal bond must be filed within five days of rendition of judgment for possession (1951 ILLINOIS REVISED STATUTES, Chapter 57, Section 19; GHOLSTON vs. TERRELL, 292 Ill. App. 192; PRASNIKAR vs. HARMELING, 329 Ill. App. 341; KRUSE vs. BALLSMITH, 332 Ill. App. 301; CHICAGO HOUSING AUTHORITY vs. FRANK, 335 Ill. App. 456; ATLAS FINISHING CO. vs. ANDERSON, 336 Ill. App. 167).

Defendants have called attention to the case of GENTLE vs. BUTLER, 278 Ill. App. 371, as authority for their position that notice of appeal and bond may be filed later than five days from the date of judgment in a forcible entry and detainer action. At the time of the decision in the GENTLE vs. BUTLER case, the provisions

of Section 19 of the Act did not specifically state that the party feeling aggrieved must file "notice of appeal and bond" within five days of the rendition of judgment. The Act now so provides and specifically recites that no notice of appeal shall be required in cases appealed from Justices-of-the-Peace. The conclusions in the GENTLE vs. BUTLER case that the five-day provision was to apply only to appeals from Justices-of-the-Peace can hardly be applicable to Section 19, as now amended.

As stated in the case of PRASNIKAR vs. HARMELING, supra, the conclusions contended for would be contrary to the express wording of the statute which creates an appeal from the judgment of the Court upon any trial had under this Act, provided it is taken within five days. The Court also pointed out that to so conclude would defeat the purpose of the statute, which was to create a summary remedy in which the rights of parties would be speedily determined, and an appeal permitted in such forcible entry and detainer cases only if taken within the time specified in the statute. Under the circumstances, we must conclude that the motion to dismiss the appeal should be allowed and the appeal is, therefore, dismissed.

Motion to dismiss appeal allowed.

Scheineman, P. J., and Bardens, J., concur.

Publish abstract only.

29 A

46114

ABC LOAN COMPANY OF ILLINOIS, INC., Appellant,	APPEAL FROM
v.	MUNICIPAL COURT
THOMAS W. CAMPBELL, IONA CAMPBELL and MALLIE LOFTIN, Defendants,	OF CHICAGO.
MALLIE LOFTIN, Appellee.	

MR. PRESIDING JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from a judgment in its favor, which is $25 less than the amount claimed by it.

A judgment by confession for $177.62 was entered upon a note, secured by a chattel mortgage on an automobile owned by one of the defendants. Defendant Loftin filed a petition to vacate the judgment by confession, and upon a hearing the judgment was vacated and the defendant allowed to defend. The petition was allowed to stand as an answer to the complaint.

The petition alleged, among other things, that plaintiff advised petitioner that defendant Campbell was no longer making any payments under said note, and that it would be necessary for petitioner to make the payments as co-maker; that thereupon petitioner made payments to plaintiff of $10 per week; that after making six such payments, petitioner advised plaintiff that the automobile on which plaintiff held the chattel mortgage could be seized and possession taken in accordance with the terms of the chattel mortgage held by plaintiff; that thereupon petitioner advised

plaintiff of the location and whereabouts of said automobile; that plaintiff agreed with petitioner that it would take possession of said automobile and foreclose its chattel mortgage and credit the proceeds of the foreclosure against said note executed by petitioner; that thereupon plaintiff took possession of the automobile in accordance with the terms of said chattel mortgage; that instead of foreclosing its mortgage, plaintiff released the automobile to defendant Campbell and did not credit petitioner with the value of said automobile; that said automobile, when plaintiff reduced it to its possession, was worth $200; and that plaintiff, without consent of this defendant, made new and other arrangements with defendant Campbell for future payments upon said note, after it released said automobile to defendant Campbell.

Upon a hearing without a jury, the court entered final judgment against defendant, reducing the judgment by confession to the sum of $152.62. The court later, upon the application of plaintiff, corrected its judgment order by inserting therein a number of findings of fact.

No report of proceedings is included in the record before us. The judgment order recited that the court heard evidence. In the absence of a report of proceedings preserving the evidence, we are obliged to presume that the evidence the court heard fully justified its findings and judgment.

The judgment is affirmed.

AFFIRMED.

KILEY AND LEWE, JJ. CONCUR.

30 A

46107

GEORGE T. JURUS and ROSE JURUS, Appellants, v. CHICAGO HOUSING AUTHORITY, a Municipal Corporation, Appellee.	)	APPEAL FROM CIRCUIT COURT COOK COUNTY.

1 I.A.2d 297

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a bill of review for errors apparent upon the face of the record of a condemnation proceeding by the Chicago Housing Authority. The chancellor dismissed the bill on motion of the Authority. Plaintiffs have appealed.

Plaintiffs are the owners of property within an area in Chicago duly designated by the Authority in 1946 as an "integrated project." The Authority resolution found that it was necessary and appropriate to acquire the real property in the area "for the rehabilitation and redevelopment of the above described blighted or slum area." This slum clearance project was approved by the State Housing Board which requested the Authority to acquire the property.

The Authority made an agreement with Michael Reese Hospital, owner of hospital facilities in the area, under which the Authority agreed to sell or lease the property condemned and the Hospital agreed to make a firm bid to purchase the area property or a portion of it. A public sale of the area property was held April 12, 1948, and on May 19th the Authority accepted the bid of the Hospital for 40 parcels of the property.

Meanwhile the City Council on April 29, 1947 approved the slum clearance project. On July 15, 1948 the State Housing Board approved the sale by the Authority to the Hospital.

In March, 1947 the Authority offered plaintiffs $750.00 for their property. February 20, 1948 it filed its condemnation suit. The plaintiffs moved to dismiss on the grounds: (a) that the stipulated facts showed the Circuit Court had no jurisdiction to take private property for private use; (b) that the legislature had no authority to authorize the taking of private property for private use; and (c) that the action of the Authority was an unequal application of the law in violation of the Federal Constitution.

The facts we have set forth were stipulated at the hearing. The court denied the motion to dismiss. It submitted to a jury the question of compensation to be awarded plaintiffs. The jury awarded $5000.00. The court on November 5, 1951 found that sum just compensation and ordered the Authority to pay plaintiffs in 90 days.

Plaintiffs filed notice of appeal from the condemnation judgment to the Supreme Court. The appeal was dismissed by the trial court March 18, 1952 for failure to file a record in the Supreme Court within 60 days of the filing of the notice of appeal. Rule 36 (1) (e) Rules of Supreme Court. Plaintiffs made no other attempt at further review of the condemnation judgment. They filed this bill of review the same day their appeal was dismissed.

The prayer of the bill of review is that the condemnation judgment be set aside for errors "apparent on the record." These "errors" are the claims of lack of jurisdiction of the Circuit Court to take, and lack of power of the legislature to authorize the taking of, private property for private use, and the violation of the due process clauses of the Federal and State Constitutions. The trial court dismissed the bill on motion of the Authority. Plaintiffs appealed to the Supreme Court of Illinois which transferred the case here.

The essence of plaintiffs' contentions is that the taking of their property was for the private purpose of the hospital or in any event for public and private purposes which are inseparable.

The record indicates that the property of plaintiff was not included in the portion sold to the Hospital. We shall pass this apparent lack of standing on the part of plaintiffs to raise the objection they have made to the court's jurisdiction. Schreiber v. County of Cook, 388 Ill. 297, 308; Elliott v. University of Illinois, 365 Ill. 338, 346; Post Printing & Publishing Co. v. City & County of Denver, 68 Colo. 50, 189 Pac. 39; 16 C. J. S., Constitutional Law §87. Neither shall we consider defendant's contentions with respect to the improvident use of a bill of review under the circumstances of this case.

Plaintiffs say the question before this court "on the pleadings" is "Does the Circuit Court have the power to grant a petition to take private property for private use?"

We think that plaintiffs beg the question of the taking for private purpose. The Supreme Court decided in a similar case that the taking was not for private purpose. Chicago Land Clearance Commission v. White, 411 Ill. 310. There the Commission had contracted to sell the New York Life Insurance Company a portion of the cleared slum and blighted area. The Court said at p. 316: "The subsequent development of the property by the New York Life Insurance Company does not mean that the taking is for a private purpose. Consequently, the many authorities cited in appellants' brief to the effect that private property cannot be condemned for private use are not applicable to the present situation." That language is squarely applicable in the instant case and sufficient to answer plaintiff's contention that the taking was for private purposes or for inseparable public and private purposes.

We think the issues raised by plaintiffs have been settled by the Supreme Court in the White case. We see no need of further discussion.

The judgment is affirmed.

JUDGMENT AFFIRMED.

FEINBERG, P.J. AND LEWE J. CONCUR.

31 A

46196

THE H. PIPER COMPANY, a corporation, Appellee, v. SUMMIT FAST FREIGHT, INC., a corporation, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

Defendant, a common carrier, appeals from a judgment for damages to a shipment of perishable bakery products, resulting from defendant's failure to deliver the shipment to plaintiff's consignee at a specified time in accordance with the terms of an alleged oral agreement.

No appearance or brief has been filed by plaintiff in this court.

Plaintiff operates a wholesale bakery in the City of Chicago. Plaintiff claims that in July, 1952, defendant orally agreed to deliver plaintiff's products at Warren, Ohio, not more than twenty-four hours after receiving them for shipment from plaintiff.

September 10, 1952, defendant received a shipment of bakery products packaged in cartons from plaintiff at Chicago between the hours of 1 and 6 o'clock p.m. This shipment did not arrive at Warren, Ohio until 10:45 a.m. on September 12th when the shipment was offered to plaintiff's consignee, one Wilson at Warren. He refused to accept it for the reason that the bakery products were more than two days old.

Robert Bell, defendant's truck driver testified that he left Chicago with plaintiff's shipment at midnight on September 10th and arrived at Toledo, Ohio about 7 o'clock the next morning; that he then remained off duty for a period of seventeen hours when he resumed his journey to Warren, and that shortly after leaving Toledo an oil line on the truck burst, causing a delay of approximately two hours. Thomas P. Scanlan, a traffic consultant called by defendant, testified that in his opinion the average time for truckload traffic between Chicago and Warren, a distance of about 400 miles, is four or five days, and that safety rules of the Interstate Commerce Commission require an eight-hour rest period for a truck driver after being on the road more than ten hours.

Defendant's principal contentions are that the bill of lading is the contract of shipment and supersedes any prior undertaking and that the burden of proof is on plaintiff to show by competent evidence that the delay was so great as compared to the usual time for like shipments that it is more reasonably attributable to negligence than to other causes.

The record shows that defendant had an approved traffic schedule on file and that at the time defendant received the shipment here in controversy from plaintiff it prepared a bill of lading in triplicate which was signed by defendant. Section 2(a) of the bill of lading, which was received in evidence, reads: "No carrier is bound

to transport said property by any particular schedule, train, vehicle or vessel, or in time for any particular market or otherwise than with reasonable dispatch."

The bill of lading when signed by the parties is evidence of the contract and this written contract superseded the alleged oral contract. See Idaho Sheep Co. v. Oregon Short Line R. Co., 188 Ill. App. 591. The parties could not waive the terms of the contract under which the shipment was made nor could defendant be held to a different responsibility than that fixed by the agreement under the published tariffs and the regulations. (Berg. v. Schreiber, 405 Ill. 528.)

In the instant case the trial court rested its finding on the ground "that a seventeen-hour layover in Toledo is negligence." No evidence was offered by plaintiff tending to prove the usual and customary time for shipments between Chicago and Warren. Defendant's witness Scanlan testified that the average time to transport goods between Chicago and Warren on truckload traffic would be four or five days, and defendant's other witnesses, Bell and Rosene said that normal delivery between Chicago and Warren was on the second morning.

The bill of lading is the contract of carriage and in the absence of any evidence by plaintiff tending to prove such an unreasonable delay as to constitute negligence (Goliger Trading Co. v. Chicago and N. W. Ry. Co., 184 Fed(2) 876) we are impelled to reverse the judgment.

For the reasons given, the judgment is reversed.

JUDGMENT REVERSED.

FEINBERG. P. J., and KILEY, J., Concur.

3793 A

APPELLATE COURT
STATE OF ILLINOIS
FOURTH DISTRICT

October Term, A. D. 1953.

Term No. 53-0-13. Agenda No. 7

- - - - -

CHARLES W. LOOMIS, Administrator of the Estate of Penny Joe Loomis, Deceased, Plaintiff-Appellee,	)	Appeal from the Circuit Court of Marion County.
-v-	)	
GEORGE TADLOCK, Defendant-Appellant.	)	

- - - - -

BARDENS, J.

This appeal is taken from an order of the Circuit Court of Marion County denying defendant's motion to vacate a default judgment.

The suit is an action under the wrongful death statute. It was commenced March 28, 1953. The summons which issued designated Monday, April 20, 1953, and Monday, May 4, 1953, as return days. It was served on defendant March 30, 1953, and filed April 17, 1953.

Court was held in Marion County on April 18, 1953, and was then adjourned to April 27, 1953. On April 21st the plaintiff with his attorneys appeared before one of the judges, default was entered against the defendant, evidence was heard, and judgment rendered for plaintiff in the amount of $10,000.00.

On April 24, 1953, defendant filed his motion to vacate the judgment and permit filing of an answer. Attached to the motion were a proposed answer and an affidavit of E. H. Nordstrom, an adjuster in charge of the case for defendant. Plaintiff answered the motion and reply was made thereto. Several affidavits and counteraffidavits were filed. The court heard the matter on the motions and affidavits and on May 23, 1953, denied the motion to vacate.

Several questions of serious import have been raised on this appeal but after a careful study of the pleadings and affidavits, our decision will be based on the merits of the controversy raised by the motion to vacate.

Certain facts appear undisputed. These are: Prior to suit Nordstrom had been employed as adjuster to investigate the facts out of which the death of plaintiff's intestate occurred; after suit was filed and service had, defendant delivered the summons to Nordstrom who said he would look after the matter; Nordstrom miscalculated the number of days between March 30 (the day of service) and April 20 (the first named return date) and erroneously concluded the answer or appearance of defendant was not due until May 4th; this erroneous conclusion was communicated to the attorneys for plaintiff in a conference with them had on April 17, 1953; the motion to vacate was filed three days after judgment and therefore well within the thirty days in which the court had power to set it aside(sec.

50 of Practice Act, Par. 174, Chap. 110, Illinois Bar Statutes); the affidavits attached to the motion set out sufficient facts to disclose a meritorious defense to the effect that defendant was not negligent.

Plaintiff has cited numerous cases to the effect that a failure of the defendant to appear on the date fixed by the summons is not excusable when the defendant or his agent or attorney forgets or miscalculates or is guilty of any negligence in the failure to appear at the appointed time. Some of these cases are ones in which the application for setting aside the default was filed after the thirty days and some within the thirty days or within the term. Typical of these cases cited are Chmielewski v. Marich, et al., 350 Ill. App. 379, 113 N.E. 2nd 69; Wagner v. Sulka, 336 Ill. App. 101, 82 N.E. 2nd 922; Gustafson v. Lindquist, 334 Ill. App. 287, 79 N.E. 2nd 306; Whalen v. Twin City Barge and Gravel Company, 280 Ill. App. 596; and Hartford Life and Annuity Insurance Company v. Rossiter, et al., 196 Ill. 277. We have read and considered all of these cases. However, there is one element in the case at bar that did not exist in any of the cases cited, namely, the fact that plaintiff's attorney was advised of the miscalculation made by the defendant and therefore advised of the defendant's belief that appearance was not due until May 4, 1953. In view of this fact and under the circumstances of this case as set out, we feel that the ends of justice will be better served by the

allowance of the motion to vacate. In this connection, section 4 of the Practice Act, paragraph 128, chapter 110, Illinois Bar Statutes, provides that the Act should be liberally construed to the end that controversies may be speedily and finally determined according to "the substantive rights of the parties."

For the reasons stated, the order of the court denying the motion to vacate is reversed and the cause is remanded with directions to vacate the default judgment and allow the defendant to plead.

Reversed and remanded with directions.

Scheineman, P. J. and Culbertson, J. concur.

Publish abstract only.

38½ A

Abstract

STATE OF ILLINOIS

APPELLATE COURT THIRD DISTRICT

October ~~FEBRUARY~~ TERM, A.D. 1953

General No. 9912 Agenda No. 9

1 I.A.2d 299

Wareham's Dairy, Inc., a Corporation,
Plaintiff-Appellee,

vs.

Wabash Railroad Company, a Corporation,
Defendant-Appellant.

) Appeal from the Circuit Court of Christian County

Wheat, J.

This is an action for personal property damage wherein judgment was entered on jury verdict in the sum of $1866.40 in favor of the plaintiff-appellee, Wareham's Dairy, Inc., a corporation, and against the defendant-appellant Wabash Railroad Company. Motions for judgment notwithstanding the verdict and for a new trial were denied, from which this appeal is taken.

The complaint charges that on January 15, 1952, at about 6 A.M. in the City of Taylorville, Illinois, the defendant railroad was operating a locomotive and a car in a southwesterly direction where the railroad tracks intersected Adams Street; that plaintiff was operating a 1950 Ford truck carrying dairy products in a westerly direction on Adams Street, in the exercise of due care; that

defendant negligently failed to sound a warning, failed to maintain said railroad crossing in a safe manner in that, although defendant has erected signal lights, such were not operating, and that as a result of such negligence, which was both statutory and at common law, the train struck the truck, causing damage to the same and its contents.

It is urged that the trial court should have allowed defendant's motion for judgment notwithstanding the verdict, or in the alternative should have granted a new trial. The chief ground argued in support of each of said motions is that plaintiff failed to prove that it was in the exercise of due care and that on the contrary, plaintiff was guilty of contributory negligence. It will therefore be necessary to briefly review the evidence in the case.

Certain facts are not in dispute. Adams Street and Cherokee Street intersect each other at right angles, Adams Street extending east and west and Cherokee Street north and south. At the point of intersection the tracks of the defendant railroad intersect diagonally northeasterly and southwesterly at a forty-five degree angle. The railroad had installed three automatic electrically operated warning signals at the intersection, one being at the northwest corner of the two streets, one at the southwest corner and the one pertinent to this case being east of the intersection, east of the tracks and on the north side of Adams Street. Plaintiff's dairy is located on said Adams Street about seven blocks east of the intersection. Plaintiff's agent, Robert Kevie, was driving a truck loaded with milk products, west on

said Adams Street from the dairy toward the railroad tracks at about 6 A.M. on the morning of January 15, 1952. It was dark, the weather was clear and the streets were dry. Defendant's train, consisting of an engine and caboose, was proceeding from the northeast and struck plaintiff's truck in the intersection. The amount of damages to the truck and contents in the sum of $1866.40 is not in dispute.

Robert Kevie, the driver of the truck, testified that he had been driving a truck for the plaintiff for one and a half years and was familiar with the crossing, as on each day it was necessary for him to cross it two times; that the truck headlights were lighted at and prior to the collision; that as he approached the intersection the electric signal east of the tracks and on the north side of Adams Street was not operating, so that he went right on, although he slowed down because of a slight grade. He further stated, "I slowed down and went over it and just as I got past it I could see that this other signal was still working, that is the one on past the crossing, and just at the same time I saw that thing out of the corner of my eye I felt the impact." His reference to the other signal was to the one at the southwest corner of the intersection and that as his truck was whirled around this other signal was knocked down but continued to operate; that the right window of the truck was closed but that the left window was open an inch or so. He heard no whistle or bell but said that he would have heard the whistle if one had sounded; that he looked both right and left before crossing the tracks; that his speed was not over fifteen miles per hour; that he saw no light of

said James Jones from the duty lamps the railroad bridge so close
o e.s. on the crossing on Century 13, 1955. It was dark, the weather
was clear and the streets were dry. Defendant's truck, consisting of
an engine and cabooze, was proceeding from the northwest on Grove
plaintiff's house in the intersection. The amount of damage to the
truck and cabooze is the sum of $1800.00 is not in dispute.

Robert Davis, the driver of the truck, testified that he was
then driving a truck for the plaintiff; he was on a cross-town
war footing with the crossing; he had had it for approximately
six to seven months; that the crossing signals were lighted at
and prior to the collision; that he is acquainted with the intersection
the electric signal lamp of the tracks and on the north side of these
tracks was not operating, he did not hear sirens or, although he stopped
some distance in a sitting place, no railroad crossing. He stopped some 30
feet over to and then as I got near it I could see the red light other
signal was still working, that is the one on this side coming, the
lamp at the pole. He was then there and if the engine of my car
I felt the impact. The reference to the other signal was to the
of the mechanical signal at the intersection and that on this occasion was
working. Defendant's truck was proceeding east on Grove Street
said that he would have heard the whistle if one had sounded; that
he looked both right and left before crossing the tracks; that his
speed was not over fifteen miles per hour; that he saw no light at

the approaching train, not even when it later backed up. After the collision the train crew came to the scene and one of the men said he didn't see the signal blinking when he went by. This man is not identified. To make a test as to whether or not the signal in question was properly operating, the train was backed up, but the witness was on the west side of the train and could not see the result of the experiment. Plaintiff's witness, Edward Lukack, lived on Adams Street, the second house west of the tracks. He heard the noise of the collision and was dressing when Kevie came to the house to use the telephone. Then the engineer and brakeman came in and they talked to Kevie. He later said that he did not know if one of these men was the engineer or not but that he did later get into the engine; the brakeman asked the engineer if the signal light was working and the engineer shook his head. They left the house to test the signal lights by backing up the train and when this was done the light in question was not working. This was all of the testimony for the plaintiff.

Paul Best, the train engineer, testified that the train was travelling thirty to forty miles per hour, the headlight was burning, the whistle was blowing almost continuously because of the many crossings and that in particular the whistle was blowing for the Adams Street crossing; that the bell, after being turned on, rings continuously and automatically, but that due to the noise in the cab he was unable to hear whether or not it was ringing at the time of the collision, but that when the engine stopped immediately thereafter the bell was ringing; that by reason of the lapse of time he does not recall observing

the signal lights when the train crossed the intersection; that when the test was made after the collision by backing the train up all of the signal lights were in operation. The witness did not go to the Lukack house and he did not make any statement in the presence of Lukack that he did not see any lights working. Sherman Berry, the train fireman, testified similarly as to the sounding of the whistle and the ringing of the bell and that the engine headlight was burning. He had a view of the approaching truck just before the collision; he remained in the engine from the time of the collision until it backed up to make the light test. All of the signal lights were then working. W. A. Culley, the train conductor, testified similarly as to the bell and whistle; that he went to the Lukack house to get a statement from Kevie, who said that the flasher wasn't working. No other railroad man went to the house with him. When the train backed up all flasher signals were operating. Ralph Fortner, a trainman, testified as to the whistle and as to the test of the electric signals, which he said were operating after the collision. He did not go to Lukack's house nor talk to him. Brakeman G. J. Smith did not leave the scene of the accident and did not talk with anyone about it, nor did he go to the Lukack house. Henry Roberts, a signal maintainer for the railroad, made manual tests of the signal lights about an hour after the collision and all of them were working and required no repairs except as to the one which was knocked over. Cecil Miller, a track supervisor for the railroad, saw the flasher light on Adams

Street east of the intersection in operation when the train backed up.

As to whether or not the railroad was negligent in failing to sound an audible warning, the evidence is almost conclusive that such warning was properly sounded. The driver of the truck, with the right cab window closed and the left one open an inch or so, furnishes the only testimony to the contrary and such testimony is purely negative in character. As to the other charge of negligence, to-wit: that the railroad, after installing signal lights, owed a statutory and common law duty to properly operate the same, it is apparent from the manifest weight of the evidence, that all of the lights were properly operating just at and prior to the collision, but in any event, whether the lights were operating or not, the failure of such an electrically operated signal does not relieve a traveller from his duty to look and listen for approaching trains. Grubb v. Ill. Terminal Co., 366 Ill., 330; Applegate v. Chicago & N. W. Ry. Co., 334 Ill. App., 141. As to the question of whether or not plaintiff was guilty of contributory negligence, it appears from a manifest weight of the evidence that he was familiar with this crossing, having used it twice a day for one and a half years; that he must have known that it was an obvious place of danger by reason of the angle at which the tracks crossed the street intersection; he failed to see the engine headlight; he did not stop for the crossing and his conduct was such that it can be said he was guilty of contributory negligence so as to bar recovery.

From the above the Court is of the opinion that the motion for a new trial should have been granted and that this Court should reverse the judgment of the Circuit Court. It would seem that no useful purpose would be served in remanding the cause for a new trial, as undoubtedly the evidence would be the same. As this cause will be reversed without remanding, it becomes unnecessary to pass upon the ruling of the trial court upon the motion for judgment notwithstanding the verdict. The judgment of the Circuit Court is reversed.

Reversed.

284 A

46040

VIRGINIA L. HASTE, Appellee,	)	APPEAL FROM
v.	)	SUPERIOR COURT
CLARENCE B. HASTE, Appellant.	)	COOK COUNTY

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

This is a consolidation of two causes of action: (1) the separate maintenance suit by the plaintiff, Virginia L. Haste, against her husband, Clarence B. Haste; and (2) the divorce action by the husband against his wife. Trial by the chancellor without a jury resulted in a decree granting separate maintenance to the wife and dismissing the husband's suit for divorce for want of equity, from which he appeals.

The parties were married in 1929 and lived together as husband and wife until 1949. A son was born of the marriage who was a student in college when the proceedings were instututed and who had attained his majority at the time of the entry of the decree. Since 1927 defendant has been employed by the Illinois Bell Telephone Company, and at the time of the trial was a branch manager, a position of considerable responsibility, with twenty-five people under his supervision; his gross salary in the year 1949 was $8200.00, and his take-home pay was a little over $500.00 a month. His duties with the company included public-relations work, which required him to appear before various civic groups, business associations,

church groups and women's organizations, for whom he was required to show company - movies and demonstrate telephone equipment. Some of his work was carried on in the evening and it was often necessary for him to work as many as fifty to sixty hours a week, resulting in his coming home late at night. There was considerable evidence by his co-executives of his good reputation and his competency. Plaintiff testified that he did not miss more than an average of two days a year in his employment, and that although he used liquor he was drunk less often than once a year over a fourteen-year period. His son testified that he never saw his father exhibit any violent temper or abuse his mother in any way. Defendant paid all the bills of the household, and in addition thereto gave his wife a monthly allowance for her expenses, and in February 1949, about four months before the separation, paid her expenses for a trip to Florida. There is considerable evidence that plaintiff had a strong dislike for household duties; she admitted that she did not want to be a housekeeper and preferred a career. On various occasions she grew tired of living at home and would stay away for periods ranging from as little as one day to as much as thirteen weeks, visiting relatives. In the summer of 1947, less than two years before the separation, she told her son that she was bored with housekeeping and would like to obtain a position. She was a laboratory technician, and immediately

after the separation she procured a position with a medical clinic. Before leaving her husband she had been active in club work, PTA and various other civic organizations, and for purely social diversion she played bridge. Defendant stated that he was glad to have his wife participate in these activities.

From the evidence it appears that the married life of the parties was not compatible; they were irritable toward each other. Plaintiff was interested in a career, and as a housewife enjoyed only the outside activities which her free time made it possible to pursue. Defendant's irregular hours constituted a source of annoyance to her, whereas her incompetent housekeeping was a matter of concern to him.

The basis for plaintiff's separate-maintenance complaint is cruelty, dating back for several years. In a preliminary hearing before the master in November 1950, held for the purpose of determining whether plaintiff was entitled to temporary alimony and attorneys' fees, she related no specific acts of cruelty between the years 1936-1947. However, on trial she testified to incidents in 1938, 1939, 1940, 1941, 1942, 1943, 1944 and 1946. Her description of these various acts of cruelty followed a similar pattern. She stated that her husband chased her around the room and tried to hit her, hurt and bruised her, threw her against the wall and beat her up when she came home. There were no

eyewitnesses to any acts of cruelty. Mrs. Blanche Webb testified that she observed a discoloration on plaintiff's body in 1937, over twelve years before the separation in 1949. Plaintiff's brother, Harry W. Leonard, Jr., testified to bruises he observed on his sister's face and arms in July 1936; he admitted plaintiff and defendant were living normal lives when he last saw them in 1946. A second brother, Taylor Leonard, testified as a corroborating witness and stated that he saw bruises on plaintiff in 1941. Defendant emphatically and specifically denied every act of cruelty testified to by plaintiff, and there was no corroboration of any acts of cruelty after 1941.

The separation occurred June 12, 1949. On direct examination plaintiff testified that the last two acts of cruelty preceding that event occurred on April nineteenth and June tenth of that year. She fixed the first date, that of April nineteenth, because she said it was her birthday and connected that particular occasion with the act of cruelty. However, before the master she had said that it was not on the nineteenth of April but later, toward the end of the month. Thus, her earlier testimony is inconsistent with the statement made by her on direct examination that "he struck me and said 'that is your birthday present.'" As to the June tenth incident preceding the final separation by two days, there was likewise considerable contradiction in her

testimony. Before the master at the hearing that preceded the final trial by two years, she stated several times that a two- or three-week period intervened between the last act of cruelty and the date of the separation, and that she lived with her husband two or three weeks after the last act of cruelty was committed. This circumstance may in part account for the variation in her testimony at the trial, when she stated that the last act of cruelty occurred on June tenth, and that she left her husband two days thereafter. With respect to the final separation, plaintiff testified that on Saturday, June eleventh, her husband was out all night; that about Sunday noon she decided to leave him and go to her family in La Grange; that she "just had gotten tired of this twenty years of beating by my husband; my son was raised, my husband didn't like anything that I did around the house for him, didn't want me there and he threatened to throw me out. I went to my mother's on June twelfth, that is when I left permanently." Thereafter she stayed at her mother's home until early in August, when she obtained a position in the clinical laboratory of Mercy Hospital here in the city at $200.00 a month, and the following June she left ~~xxxxxxx~~ for California, where she took a position as a laboratory technician at Chula Vista at $250.00 a month.

Defendant testified that on a few occasions over the years he had engaged in all-night card games

with co-workers, but he did not recall having stayed out all night on June tenth or eleventh, and denied that there was any provocation for plaintiff's leaving on June twelfth; that after she left he asked her "at least a dozen times" to return to him but that she never offered to come back; that he kept the household intact and lived in the same apartment and was still there at the time of the trial; that before she left for California he told her that as long as she had made up her mind to live alone she could come in and take anything she wanted; that she came in when he was out of town, took some of the silverware, pictures and small incidentals that were easily transportable; that in the early part of 1950 she called him and he went out to Mercy Hospital, where she was working at the time, and took her to dinner because she wanted to tell him about a contemplated trip to Hawaii, saying that she wanted to go over there to work in a hospital and live with her maiden sister; that he again told her that he thought it was a mistake, and that "if she was putting that much distance between us I was afraid it was hopeless to ever patch up our marriage or make a go of it." Upon the state of the record the able chancellor who presided at the trial evidently had considerable difficulty in making a decision. He observed that the evidence was highly contradictory; that defendant was a man "of high repute in the community, well thought of where he is employed,

and his testimony is entitled to belief with the court. There is no showing that he is not entitled to full credence. On the other hand, his wife is likewise entitled to full credence. His testimony taken alone was in no way contradicted. In a case of this kind, he would be entitled to a divorce. If her testimony was taken alone, she would be entitled to a decree for separate maintenance, so the court must take all of the testimony and try to determine where the preponderance is." In reviewing the evidence the chancellor observed that plaintiff's testimony "is not corroborated to a great extent, but there is some corroboration," and concluded that plaintiff was entitled to a decree for separate maintenance, and that defendant's suit for divorce ought to be dismissed. The decree reflects the decision of a chivalrous gentleman.

From a careful examination of the record we have reached the conclusion that the earlier acts of cruelty were extremely trivial in character; that they were condoned over the years by continuous resumption of the marital relation and afford no basis for a decree in plaintiff's favor; that her testimony with respect to the acts of cruelty immediately preceding the separation was highly contradictory and specifically denied. Plaintiff admitted on cross-examination at the trial that she told her relatives time and time again that she was bored and tired of housework; she also made these statements to her husband and her son. Shortly after she left defendant she secured a position at Mercy

Hospital doing work in which she was interested. Her son was completing his college course, and what appears to have been a voluntary desertion on June 12, 1949 was undoubtedly prompted by her desire to terminate the marriage relationship and pursue the career in which she had long been interested. Her refusal to return to defendant after she left strongly supports these conclusions.

There is no doubt that the parties were incompatible or that the home conditions were often not harmonious. Both the husband and the wife contributed to this situation. The rule is well settled that in order to justify a wife's living separate and apart from her husband it is incumbent upon her to prove, by substantial and convincing evidence, that her life was rendered unbearable; trivial difficulties or slight obliquities will not justify separation. We cannot, upon the record presented, find justification for the decree of separate maintenance in favor of plaintiff. The state makes every effort to preserve the marital relation rather than to disrupt it; and here it was defendant who, in good faith, attempted to induce plaintiff to resume her position as his wife. "The public policy of the State is for the maintenance of the home and the sustaining of the marriage relation and a few insignificant differences cannot be construed as being a justification for breaking the family tie." Garvy v. Garvy, 282 Ill. App. 485. See also Ollman v. Ollman, 396 Ill. 176; Schraeder v. Schraeder,

26 Ill. App. 524; and Jackman v. Jackman, 213 Ill. App. 329. Since plaintiff had left without legal provocation, defendant should have been granted a divorce on grounds of desertion.

Plaintiff is gainfully employed and upon the record is not entitled to further maintenance and support. However, these consolidated cases were sharply contested, and plaintiff should be reimbursed for reasonable attorneys' fees, when proper application is made therefor, and costs should be taxed against defendant.

The decree of the Superior Court is reversed, and the case remanded with directions that plaintiff's complaint for separate maintenance be dismissed and that a decree for divorce on grounds of desertion be entered in favor of defendant.

DECREE REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.
COSTS TO BE TAXED AGAINST
DEFENDANT.

NIEMEYER, P. J., and BURKE, J., Concur.

19 A

46236

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error, v. PAUL J. O'SHEA, Plaintiff in Error.	ERROR TO MUNICIPAL COURT OF CHICAGO

MR. PRESIDING JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Plaintiff in error, hereinafter called defendant, asks the reversal of a judgment entered in a trial before the court finding him guilty of contributing to the delinquency of the prosecutrix, aged 10 years, and sentencing him to the county jail for two months.

The information charges that defendant committed acts tending to render the prosecutrix a delinquent child in that he "did engage in indecent lascivious conversation with (the prosecutrix, naming her), concerning men and women's respective private parts." This charge is substantially identical with the charge sustained in People v. Ostrowski, 402 Ill. 106, where as here the defendant appeared with counsel, waived trial by jury and proceeded to a hearing without objecting to the information.

Defendant rightly contends that the charge in this case is similar in character to a charge of taking indecent liberties with a minor child or rape, in respect to which the Supreme court has repeatedly held that the accusation is easily made, hard to be proved and harder

to be defended by the party accused though ever so innocent, and that to sustain a conviction the testimony of the prosecuting witness must be corroborated or be otherwise clear and convincing. (People v. Williams, 414 Ill. 414.) It is significant that there is no attempt to answer this contention. The testimony of the plaintiff is denied by the defendant, who at the time of the trial was a married man 44 years of age. Three witnesses who worked with defendant at various times from the year 1940 to the time of the trial testified to his good reputation during the times they worked with him. The testimony of the prosecutrix is without corroboration. She testifies that she walked with the defendant for approximately three blocks, "about an inch behind him"; that when he asked her if she wanted a coke she became frightened, ran across the street, stopping an automobile in which a policeman, apparently without uniform, was riding with his wife. The policeman testified that he heard the prosecutrix "holler help"; he put her in his automobile and then arrested the defendant. He did not ask him about any conversations with the prosecutrix.

The evidence does not meet the requirements of the law and the judgment is reversed.

REVERSED.

BURKE and FRIEND, JJ., Concur.

20 A

46140

PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error, v. WILLIAM S. BOWMAN, Plaintiff in Error.	)	ERROR TO MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

An information in the Municipal Court of Chicago alleged that William S. Bowman on April 26, 1952, at Chicago, "unlawfully, and wilfully, did knowingly without lawful consideration, take, accept and receive a certain sum of money, to-wit, $4.00 U.S.C. Dollars, a certain thing of value, to-wit from Dorothy Jarrard, a certain female person, which said $4.00 U.S.C. was a part of the earnings of said Dorothy Jarrard from the practice by her of prostitution; and so the defendant is guilty of the crime of pandering," contrary to the statute.

A motion to quash was denied and a plea of not guilty entered. On a trial before the court and a jury the defendant was found guilty of pandering in manner and form as charged in the information, and punishment fixed at six months in the County Jail and payment of a fine of $300. Motions for a new trial and in arrest of judgment were denied and judgment was entered on the verdict. The defendant prosecutes a writ of error to review the judgment.

The defendant insists that the part of the act under which he is prosecuted violates Article 5 of the federal constitution and Article 2 of our state constitution.

This court does not have jurisdiction to pass on the constitutionality of an act of the legislature. In People v. Raymond, 393 Ill. 147, the court said (152):

> "By taking a writ of error from the Appellate Court he waived the right to raise constitutional questions."

Defendant asserts that the information does not allege a crime and that the thing of value supposedly received by him is insufficiently described. In People v. O'Campo, 330 Ill. App. 401, we said (406):

> "Using abbreviations in an information should not be encouraged. However, the fact that abbreviations are used does not make the information vulnerable to attack, providing the offense is stated so plainly that the nature thereof may be easily understood. The question presented in the instant case is whether the information gave defendant enough information to prepare his defense and whether it is sufficiently definite as a bar to further prosecution."

We are satisfied that the defendant would understand that the charge that he took, accepted or received "$4.00 U.S.C. Dollars" meant $4.00 in United States currency. No one will contend that $4.00 in United States currency is not a thing of value. We do not agree with the defendant that it was necessary to describe the currency by the denomination of the bills or pieces of silver.

Defendant contends that the information does not state a crime because it does not allege that he knew that the monies he received were obtained by means of prostitution. The elements prescribed by the statute are (1) knowledge, (2) unlawful consideration, (3) the taking, accepting or receiving money or a thing of value from a female person and (4) the money or thing of value being from the earnings of the female's prostitution. The information alleges that the defendant (1)

unlawfully, wilfully and knowingly (2) without lawful consideration (3) received a certain sum of money from a female named Dorothy Jarrard (4) which sum of money was a part of her earnings from the practice by her of prostitution. All the elements prescribed by the statute are alleged in the information. The charge is for pandering. The information charges the crime in the language of the statute so far as applicable to the facts and in words calculated to enable a person of common understanding to know what was intended.

Finally, the defendant urges that the State's Attorney in his argument to the jury committed prejudicial error. The writ of error brought up the common law record. The defendant seeks to have us consider an affidavit by his trial attorney as to what was said in the argument to the jury. There is no certification by the trial judge. When the review is upon the common law record, the sole matter that may be considered by the court is error appearing on the face of the record and matters may not be added by argument, affidavit or otherwise to supply or expand the record. See People v. Loftus, 400 Ill. 432; People v. Baldridge, 403 Ill. 606. As we are confined to the common law record we cannot consider the defendant's assertion that prejudicial error was committed in the State's Attorney's argument. The judgment of the Municipal Court of Chicago is affirmed.

JUDGMENT AFFIRMED.

NIEMEYER, P.J., and
FRIEND, J., Concur.

[illegible]

[illegible]

[illegible]

21 A

46243

CITY APARTMENTS, INC., a corporation, Appellee, v. EMIL ISMAIEL, Appellant.	INTERLOCUTORY APPEAL SUPERIOR COURT COOK COUNTY.

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

City Apartments, Inc., a corporation, filed a complaint in chancery in the Superior Court of Cook County against Emil Ismaiel to enjoin him from terminating or canceling a written lease, and from filing or prosecuting a forcible detainer action for possession of the premises described in the lease. The defendant joined issue on the material allegations of the complaint. On motion of the plaintiff the chancellor entered an order restraining the defendant as prayed and he appealed.

No evidence was offered by plaintiffs in support of the allegations of the complaint. The answer presented a complete defense. The chancellor could not resolve the issues without evidence or affidavits. See Shlensky v. South Parkway Bldg. Corp., 350 Ill. App. 293; Miller v. Chicago Transit Authority, 339 Ill. App. 398; Moss v. Balch, 320 Ill. App. 135, (Abst.); Exchange National Bank v. Credio, 344 Ill. App. 124, (Abst.) Therefore, the order granting the injunction is reversed.

Chicago,

ORDER REVERSED.

NIEMEYER, P.J., and
FRIEND, J., Concur.

22 A

45922

PAYSOFF TINKOFF, Appellant, v. ESTELLE F. CLINE, etc., et al., Defendants, ESTELLE F. CLINE, Appellee.	APPEAL FROM SUPERIOR COURT, COOK COUNTY

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

On March 26, 1952 plaintiff filed suit in equity in the Superior Court to restrain his eviction from premises located at 2842 West Eastwood avenue in Chicago, and to remove a mechanic's lien filed against the premises by Ardmore Decorating Service. A decree was entered against the lien claimants by default, and they are not parties to this appeal. Defendant's motion to dismiss the complaint was allowed. Subsequently the court denied plaintiff's motion to vacate the order of dismissal, as well as his motion to vacate and dismiss his own suit, and he appeals from these orders.

The litigation arises out of the contract entered into between plaintiff and defendant February 3, 1951 for a one-year lease, with a five-year renewal option, of a six-room bungalow at the aforementioned location. The stipulated rental was $100.00 per month. Pursuant to the provisions of the lease plaintiff employed Ardmore Decorating Service to redecorate the house. The

work was left incomplete, and in October 1951 a mechanic's lien suit was filed.

In his equity suit plaintiff alleged that his tenancy was threatened by an eviction proceeding instituted by the landlord in the Municipal Court, based, inter alia, on the mechanic's lien suit filed by the decorating company against him; that the mechanic's lien claim was without merit because the work had been abandoned before completion; and that he (plaintiff) had paid all rent due; and he asked that the landlord be restrained from evicting him. He also sought a finding that his lease was still in full force and effect and asked that the mechanic's lien be canceled. On April 9, 1952 plaintiff filed a petition for additional injunctive relief in the same proceeding, alleging that the forcible-detainer proceedings had been nonsuited; that on April 5, 1952 the landlord had served a five-day notice on him demanding five months' rent; that this was an endeavor on her part to deprive the Superior Court of jurisdiction; and he sought an injunction restraining the landlord from instituting any further proceedings relating to plaintiff's lease.

Thereupon the landlord moved to strike the petition, representing to the chancellor that plaintiff claimed to have tendered all rent due; that the landlord, by her five-day notice, had demanded rent, and that consequently there was no controversy on which a restraining order could be entered. Following this motion, plaintiff amended his complaint by adding that he had, on April 10,

1952, received the first rent registration filed by the landlord on January 25, 1952; that the rent therein stated was $100.00 a month; that the parties had originally agreed on a one-year lease, with a five-year renewal option, but that when the time came to execute the lease, the landlord insisted on certain bonuses. Plaintiff asked that the original contract be specifically enforced; that the lease be declared null and void; and that he be given "an Accounting of the improvements made on said property". April 28, 1952 the landlord's motions to strike the original complaint, the amendment to the original complaint and the petition for injunction were allowed. This appeal followed.

Plaintiff's contention that "rent ends with the termination of tenancy and releases tenant from any rent due after termination" is not pertinent to the instant proceeding. He refused to honor the notice of termination served on him by the landlord, remained on the premises and claimed that the notice was illegal. Thereafter, by his own uncoerced action, he chose to consider himself as a tenant, using his own breach to compel a forfeiture. When the landlord abandoned her cause of action for possession against plaintiff based on the mechanic's lien and demanded rent from him, he was clearly restored to his position as a tenant. In Hoefler v. Erickson, 331 Ill. App. 577, the court, quoting from Bernstein v. Weinstein, 220 Ill. App. 292, said that "'the acceptance of rent, as rent, for any

time subsequent to the expiration of the notice was an admission of the continuance of the tenancy and a waiver of the notice.'" In short, so far as we can ascertain, plaintiff takes the paradoxical position that the termination of the lease, because of the mechanic's lien, was unlawful, and that therefore he was entitled to stay on the premises; but that since the lease was, after all, terminated, the landlord cannot claim any further rent. The situation is analogous to that presented in Morrison v. Blackall, 68 Ill. App. 504 (aff'd 170 Ill. 152), where the court stated that "such abandonment, coupled with the receiver's refusal to yield, and continuance in possession, served to keep alive the lease, and amounted to a rescission, by mutual agreement, of the notice to terminate the lease and the attempt to get possession." Tinkoff was defendant's tenant when the five-day notice was served upon him, and he became liable for rent. The proceeding has developed into an obvious subterfuge to avoid the payment of rent for as long as the litigation could be protracted. The extent to which plaintiff has succeeded in this design can be measured by the fact, as set up in the motion to dismiss the appeal, that the judgment finally rendered against him in another proceeding was for fourteen months' rent, plus attorney's fees, in the light of which his statement that he "has at all times paid and tendered the rent of $100.00 per month when due" is not persuasive. In Mulvey Manufacturing Co. v. McKinney, 184 Ill. App. 476, it was held, supported by

a quotation from Sheets v. Selden, 7 Wall. (U.S.) 416, that on presenting a petition to restrain forfeiture for nonpayment of rent, "'all arrears of rent, interest and costs must be paid or tendered.'" See also Watson v. Smith, 180 Ill. App. 289. Since in the instant case plaintiff does not offer to pay rent or otherwise do equity, we think that his complaint fails to state a cause of action.

The judgment of the trial court is accordingly affirmed.

JUDGMENT AFFIRMED.

NIEMEYER, P. J., and BURKE, J., Concur.

23 A

46077

BENJAMIN KANTER, Appellant, v. CITY OF CHICAGO, a Municipal Corporation, Appellee.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

11 I.A.2d 420

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff sought by a complaint in chancery to compel the City of Chicago to account for monies in the City Traction Fund and in the City Transit Fund, and to restore to those funds such monies as have been allegedly improperly diverted from them. The chancellor sustained a motion to strike and dismiss the complaint, from which plaintiff appeals.

Plaintiff alleged that he is a resident of the city, a user of the facilities of local transportation, including the surface lines, for more than thirty-five years, that he has paid fares required by law, and that he brings suit for himself and others similarly situated; that in 1907 the city passed an ordinance, by the terms of which it established a trust fund called the Traction Fund, to be used only for the purchase and construction of street railways by the city; that in excess of $47,000,000.00 came into the City Traction Fund, and $29,000,000.00 in interest has been paid into that fund, a total of $76,000,000.00; that

not to exceed $57,000,000.00 has been properly paid out of that fund; that only $1,000,000.00 remains therein; and that the difference has been dissipated by the city. It is further alleged that Sections 24 and 25 of the ordinance of 1907 provided in substance that (a) the licensee compensate the city for the use of its streets by paying 55 per cent of the gross receipts, computed after allowing for certain expenses and charges; (b) that the city use such compensation for the purchase and construction of a street railway system, and for no other purpose; (c) that monies derived as such compensation be deposited in a separate fund and not commingled with other corporate funds or expended for general corporate purposes; (d) that the company account to and settle with the city each year; and (e) that the city, subject to the action of the council, deposit the money in a separate fund to be kept for the purchase and construction of street railways. Plaintiff asserted that it was the duty of the city to use the money in the Traction Fund for the purposes designated, and to invest it in a manner designed to safeguard the fund; and that in disregard of this duty the city invested the fund monies in securities of doubtful, little or no value.

With respect to the City Transit Fund it is alleged that in 1945 there was passed an ordinance enfranchising the Chicago Transit Authority which provided that all monies coming into that fund should be used for

the purposes described in the ordinance; that this was a trust fund to be used for specific purposes, namely: (a) to pay the cost of the annual audit; (b) to pay expenses of the city to protect its rights and enforce the Chicago Transit Authority's duties and obligations; (c) to meet the cost of construction or acquisition by the city of subways, etc., and to pay claims for damages against the city due to construction of subways; (d) to meet cost of renewals or replacements of subways; and (e) to meet cost of construction or acquisition of additional city-owned subways, and to construct or acquire city-owned transportation facilities; that in excess of $1,860,000.00 came into the City Transit Fund; that with respect thereto it was the duty of the city to use this fund in accordance with the provisions of the ordinance, but that disregarding its duty the city used monies in the fund as a reservoir to pay purported salaries to persons who did no work to carry out the purposes of the trust, as well as to finance other purposes not authorized by the ordinance.

The damage alleged to plaintiff and others similarly situated is that the licensee for local transportation, the Chicago Transit Authority, has been unable to furnish adequate facilities; that the funds, if properly conserved or restored, could be properly used for the construction of subways and improvements in transportation services in ways not now possible; that plaintiff is without

an adequate remedy at law in that only a court of equity can compel the city to fulfill its obligations; that he is irreparably damaged in that monies collected from him and his class will not be accounted for; that defendant will fail to make up loss due to failure of the city as trustee of the fund to do its duty as such; and that plaintiff and members of his class will be deprived of improvements in local facilities which would be secured if the city were compelled to fulfill its obligations.

Plaintiff defines the real issues to be twofold: (1) are the City Traction Fund and the City Transit Fund trusts? and (2) has the plaintiff standing to sue to protect these trusts? More broadly stated, the question is whether the payment of fares by passengers gives them a legal or equitable interest in a special fund derived from the revenue earned by the transportation system and paid to the city for the use of the streets and the right to demand an accounting of expenditures from such funds which may be used only for the extension or improvement of facilities for public transportation.

The city concedes that the special fund is a trust in the general sense of the term for certain public or corporate purposes of the city, but not a trust for the benefit of any person or group of persons; and it takes the position that neither passengers who have paid the legally established fares for their transportation nor potential passengers have such legal or equitable interest

in such fund to entitle them to sue for an accounting.

The city is of course vested with power to regulate the use of its streets. By the traction ordinances of 1907 it granted to several street railway corporations the right to use city streets in the conduct of their business, in return for which the companies promised to pay compensation to the city for the privileges granted to them. The pertinent portion of the ordinances state that "it is further provided that, subject to the action of the City Council of said City, the said City shall deposit the amount so paid to the said City to the credit of a separate fund to be kept and used for the purchase and construction of street railways by said City; but any failure to comply with this provision shall in no way affect the rights or obligations of the Company under this ordinance."

In 1945 the city granted to Chicago Transit Authority the right to operate a local transportation system upon city streets, in consideration whereof the Authority agreed to pay compensation which the city was to set aside in a separate fund to be designated as the City Transit Fund. Disbursements from that fund are limited to: "(1) the sums required to pay the cost of the annual audits of the City Transit Fund as provided in the succeeding paragraph D of this section 19; (2) the sums authorized and directed by the city council to pay the expenses of the City in connection with the protection

of the rights of the City and the enforcement of the Grantee's duties and obligations under the provisions of this ordinance; (3) the sums authorized and directed by the city council to meet the cost of construction or acquisition by the City of the subways, incline connections, extensions and connections . . . ; (4) the sums required to meet the cost of major renewal or replacement of any part of City-owned subways . . ; (5) upon authorization by the city council: (a) the sums required to construct or acquire any additional City-owned subways; (b) any sums used to construct or acquire any City-owned transportation facilities to be used in connection with the Transit System."

The determination of this proceeding rests upon the construction and effect of the foregoing provisions. Plaintiff claims that equitable trusts were thereby established for the benefit of patrons of the street railways. The identical contention was made in 1943 by nonresident patrons in the Federal court in a suit instituted in behalf of nonresident patrons of street railways, Tilney v. City of Chicago, 134 F.2d 682 (cert. denied 320 U.S. 759). A complaint was there filed in equity for an accounting of the Traction Fund which is here involved, charging misappropriation and unlawful diversion of the fund by the fiscal officers of the city. The District Court's denial of relief was affirmed. It was there contended, as it is in this proceeding, that by reason of having contributed to the traction fund, patrons had

sufficient interest to require an accounting, but the court rejected their claim, saying: "The fares paid by plaintiffs were fixed by the Commerece Commission of Illinois. Chicago Rys. Co. v. Chicago, 292 Ill. 190, 126 N.E. 585. If the amount of such fares is excessive; if, for any reason known to the law, they are improper, the one forum in which complaint can properly be heard, is the state commission, subject to the provided statutory review by the Illinois courts. When plaintiffs paid their fares, therefore, they forever parted with their money; title to it, once and for all, passed from them to the traction companies. Thereafter, plaintiffs had no voice as to its disposition, no right of control of its expenditures. When paid to the city the 55 per cent of the profits was the money of the traction companies; after such payment it became that of the city. To extend to plaintiffs the right to be heard as to its ultimate disposition, would be to vacate and supersede, in a collateral proceedings, the adjudication of the Commerce Commission that the fares paid are reasonable and proper and to grant, in a proceedings to which that commission is not a party, a rebate from such legal fares. A court of equity can not lend its aid to such an anomalous proceeding. The only injury of which plaintiffs may complain in a judicial tribunal is the invasion of some legal or equitable right. Clearly the state has a legal interest in preventing the perversion of the ordinances, but the answer

to plaintiffs' private suit is that a violation of the ordinances by the city does not injuriously affect any of their rights as car riders who have paid the legal fares. The city is not shown to owe them any duty which it has not performed."

Plaintiffs in the Tilney suit contended further that the franchise ordinance of 1907 establishing the Traction Fund constituted a third-party beneficiary contract, but the court held that an incidental benefit arising to a third party from a contract is not sufficient; "there must be a clear liability of the promisor directly to the third person," and cited various decisions in support of that proposition. The court concluded by saying that in that case not even an incidental benefit existed for plaintiffs; "they have no interest whatsoever. Rather the fund is to be kept by the city and expended by it for a proper public purpose. Patrons who have paid the legal fares have not by virtue of that fact and it alone, any enforcible legal right or beneficial interest in the contract, the resulting profits or the public fund created therefrom." We regard this case as controlling in the instant proceeding.

Equity requires that a trust must have a definite and ascertained or ascertainable beneficiary unless the trust be for a charitable or public purpose. French v. Calkins, 252 Ill, 243. Without a determinable beneficiary there is no one to enforce the provisions of

the trust. Plaintiff brought this suit as a resident of the city and a user of the facilities of local transportation. The ordinances do not oblige patrons to pay money into these funds, nor do they make such payments; the only contention is that indirectly and remotely part of the fares paid by passengers to the City Transit Authority found its way into the Traction and Transit Funds. Because of this, plaintiff claims a beneficial interest to entitle him to sue for an accounting. The traction and transit ordinances constitute contracts between the city and the grantees. Strangers to a contract cannot sue for a breach thereof where the agreement is not made for their express benefit. Root v. City of Saratoga Springs, 218 N.Y.S. 204; Carson Pirie Scott & Co. v. Parrett, 346 Ill. 252; In re Gubelman, 13 F.2d 730. Clearly, plaintiff is not a direct party to the franchise ordinances and must necessarily rely on the third-party beneficial doctrine to assert an interest in the performance of the pertinent provisions of the ordinances. If plaintiff has any interest at all he is benefited so remotely that he does not fall within the doctrine permitting suit by a stranger to a contract.

Taxpayers' suits to enjoin a misappropriation of funds or to compel an accounting of public funds enunciate the general rule that a plaintiff must show an interest in the subject matter of the suit; "a mere contingent or possible interest, or probability of future interest, is insufficient." Dudick v. Baumann, 349 Ill. 46. In that case plaintiff, as a general taxpayer, sought an accounting

by the village collector of certain fees he had deducted from assessments collected pursuant to proceedings under the Local Improvement Act. Plaintiff made no showing, however, that he was one of the property owners assessed; the court in fact found that he "is not one of those whose property has been assessed" and held that he "is therefore not interested in the disposition of the assessments collected, unless a situation arises which would lead to a misappropriation of public funds and necessity for levying taxes to meet obligations of the village because of such misappropriation." Plaintiff here is not a contributor to the Traction Fund; all he has done is to pay fares established by law; and he is not in a position to question the operating expenses of the transportation system, one of the items complained of being the payment of compensation to the city for the use of the streets; the Traction and Transit Funds were not created for his benefit.

Cases cited by plaintiff do not support his right to sue as a beneficiary. Barsaloux v. City of Chicago, 245 Ill. 598, was a taxpayer's suit to enjoin the city and its fiscal officers from paying certain warrants out of money appropriated from general funds for preliminary subway work in accordance with the terms of the traction ordinances which were alleged to be invalid. The court held that the ordinances were valid and that the city had power to acquire and construct street railways and expend for that purpose either the Traction Fund or any

other available funds not otherwise appropriated belonging to the city. People v. City of Chicago, 349 Ill. 304, was a quo warranto proceeding brought by the attorney general which was consolidated with Bass v. City of Chicago, a taxpayers' suit, to enjoin expenditures of the general funds to carry out the purposes of the Comprehensive Traction Ordinance of 1930. That case did not involve expenditures from the Traction Fund or the Transit Fund but was concerned, rather, with passing on the validity of the Traction Ordinance. Jones v. O'Connell, 266 Ill. 443, and Fergus v. Brady, 277 Ill. 272, were taxpayers' suits to restrain expenditures of tax funds. Price v. City of Mattoon, 364 Ill. 512, and Golden v. City of Flora, 408 Ill. 129, involved special funds, the taxpayers' interest in which was too remote to entitle them to maintain a suit.

For the reasons indicated the decree of the Circuit Court of Cook County is affirmed.

DECREE AFFIRMED.

NIEMEYER, P. J., and BURKE, J., Concur.

3903 A

Abstract

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT.

February Term, A. D. 1954.

General No. 9900 | Agenda No. 2.

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Defendant in Error, Vs. MILTON D. BATCHELDER and WALTER CARTER, JR., Defendants-Plaintiffs in Error.	Error to County Court of Adams County.

REYNOLDS, P. J.

Milton D. Batchelder and Walter Carter, Jr. were convicted of riot on a joint trial before a jury in the County Court of Adams County and were each sentenced to six months imprisonment. They bring this writ of error to review that judgment.

The evidence is that on the night of September 10, 1952, Dean Brooks, John Brooks and William Swain, the People's witnesses, came to Quincy, Illinois, for the purpose of purchasing tickets to a circus but failed to make the purchase and went to a tavern on North Third Street in the City of Quincy where they purchased and drank some beer. They occupied a table near the entrance to the lavatory and, as they sat, John Brooks placed his feet in another chair. The evidence is in dispute whether the chair in which John Brooks had his feet obstructed the passage to the lavatory but it appears that John Williams, the bartender, asked the defendant, Walter Carter, Jr.,

to tell John Brooks to take his feet out of the chair. Carter profanely told Brooks to remove his feet from the chair and Brooks refused. Carter returned to the bar.

The People's witnesses then ordered more beer but were refused service and the bartender told them to leave because the defendants, Batchelder and Carter, were going to "work on" them. This conversation was had within approximately six feet of where defendants were standing. The People's witnesses then started to leave and one of the men near the door jumped on the back of John Brooks. A free for all fight developed outside the tavern and, in the course of it, the defendants participated. The defendant, Batchelder, in the course of the fight, picked up a piece of two by four lumber and wielded it against the People's witnesses, inflicting wounds and bruises upon John Brooks and Dean Brooks. Defendant, Batchelder, interposed as alibi that he left the tavern before the fight but the prosecuting witnesses positively identified him as a participant in the affray.

On the trial the People adduced these facts and introduced in evidence a piece of two by four about ten feet long on which there were some red stains but the two by four was not identified as being the piece used by Batchelder, although several witnesses testified that it was either the one used or very like it. It was shown that the two by four admitted in evidence was picked up near the scene of the fight afterwards, lying by itself separate from piles of similar two by fours which were stacked nearby. The People's witnesses testified that others besides these defendants were in the

fight but could not identify anyone else.

Plaintiffs in error urge that reversible error was committed (1) in the admission of the two by four into evidence without positive evidence that it was the very one used by Batchelder as a weapon in the fight; (2) in permitting the People's witness, Dean Brooks, to descend from the witness stand to show the marks and scars received in the fight to the jury and (3) in permitting the prosecution to introduce testimony of conversation calculated to prejudice the jury against the defendant.

As to the contention that admission of the two by four into evidence was error, it appears that a two by four of the dimensions of the one introduced was used in the fight and that the one introduced was lying near the scene of the fight separate from any others. It does not appear that there was anything about the two by four which was repulsive or horrible so as to shock the sensibilities of the jury and arouse in them any passion that the recital of the testimony as to its use would not have aroused. A piece of two by four is such a common article that all men of ordinary experience would understand its capabilities when used as a weapon. It is hard to believe that the mere sight of a piece of two by four would add or detract from a jury's understanding that it might inflict serious wounds when used as a club. The testimony of the witnesses fully described the piece used and the manner of its use and it is hard to see how the introduction of this piece of lumber could have materially prejudiced defendants in the minds of the jury, particularly since it was not established as having been the one used in the fight. While the admission of the two by four in evidence without its identification may have been error, it was not such

flight but would not identify Jackson also.

Plaintiff in error then contends that reversible error was committed (1) in the admission of the testimony of Ivan John relative without positive evidence that it was the very gun used by defendant on a woman in the flight; (2) in permitting the Prosecuting Attorney, Tom Brooks, to question Cora Lee witness from in place the weapon not shown received in the flight to the jury and (3) in permitting the prosecution to introduce testimony of conversations relating to propaganda and not against the defendant.

As to the contention that admission of Ivan John testimony was error, it appears that a gun in Ivan's or the possession of the one introduced was used in the flight and that the witness saw the lights shot the woman of the flight property. Ivan John stated he does not answer that which the witness where the gun of Ivan which was probability or actually as to be shown the accessibility of the jury and which is then not showing that the relative of his testimony as to the jury would not have accepted. A piece of the jury is such a proper objection that in order to affirmed reversible error the admissibility when used in a weapon. In 11 L.R.A. 34 Miller says the same right of a place of the jury well and other place a jury's determination that is right further testimony which was used in a flight. The testimony of the witnesses Cora Lee and Ivan John of the use of the gun is a good to see how the testimony of this place of Ivan John was material. Testimony relating to the right of the jury, particularly since it was not established to having been the gun used in the flight. While the testimony of the Ivan John is without the identification of the gun been shown, it was not such

error as to justify reversal in this case. Error which does not prejudice the defendant nor affect the verdict of the jury does not require reversal where the guilt of the accused is otherwise clearly established. People v. Albanese, 379 Ill. 287.

Next, defendants contend that it was error to permit Dean Brooks to display to the jury the marks and scars about his head which were caused by the wounds received in the fight. It appears that the testimony adduced adequately described the nature of the wounds Brooks received in the course of the fight and it is hard to see how a close examination of the scars and marks left by them could have assisted the jury in understanding the issues in the case. However, it is hard to see how such a display could have materially affected the jury to the prejudice of defendants when the testimony of the witnesses described the wounds in all their gruesome aspects and it appears in the testimony that Brooks was left unconscious and bleeding profusely when the fight ended. The scars and marks are not shown to be shocking in their appearance and, if Brooks had to descend from the witness stand to the jury box in order that the jury might see them, it would indicate the scars and other evidences of injury displayed were not very noticeable or likely to inflame the passions of the jury.

It is hard to see how, after having heard detailed evidence of a bloody affray and the wounds inflicted, the jury would be materially affected adversely to the defendants by a view of scars healed so that a close inspection is required to determine their extent. There is no showing of error in this regard sufficient to require reversal of the judgment below.

Next, defendants urge error in the admission of testimony

of conversations had between the People's witnesses and others regarding the actions of defendants. These conversations were, first, between the People's witnesses and an old man in the tavern who mistook one of the People's witnesses for the defendant, Batchelder, and stated that Batchelder was the boy friend of his daughter. It appeared that Batchelder was a married man. The other conversations were between defendant Carter and the People's witnesses and between the bartender Williams and the People's witnesses. It appears that these conversations took place within a few feet of both defendants and it further appears that no objection was made to the testimony in this regard. Objections to the introduction of testimony, not objected to on the trial, may not be raised on appeal. People v. Perez, 412 Ill. 425; People v. Allen, 289 Ill. 218.

Lastly, defendants contend that the State's Attorney asked questions to the prejudice of defendants in that the questions implied immoral or indecent tendencies in defendants. An examination of the questions and answers complained of does not give support to this contention. The evidence adduced below amply justifies the verdict and judgment entered and no error appears requiring reversal. The judgment below is therefore affirmed.

Affirmed.

Mr. Justice Hibbs took no part in the consideration or decision of this case.

of conversations was thereby the lawyer's attempts to induce counsel-ing the betrayal of confidences. These conversations were, first, between the lawyer's witnesses and an old man in the street who allegedly was at the lawyer's witnesses' car on occasion, Tuesday, and stated that Lockhart was the car friend of the deceased. It appeared that Lockhart was a married man. The other conversations were between detectives Carter and the lawyer's witnesses and between the detectives Gilliam and the lawyer's witnesses. It appears that these conversations took place within a few days of both defendants in further attempts made on objection was only to the testimony in this regard. Objections to the introduction of testimony, not objected to at the trial, are not of value on appeal. Pennie v. State, 217 Ala. 630, 117 So. 2d 111, 112.

Lastly, defendants contend that the trial's discretion erred questions to the witnesses in the questions leading answer by indicated testimony is erroneous. In examination of the questions and answers consisting of does not give rise to this con-tention. The witness answered both such leading the material in judgment answer but in other cases requiring negative answer. The judgment cause is accordingly affirmed.

Affirmed.

T. Jackson Hills took no part in the consideration or decision of this case.

Abstract

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT.

3733

February Term, A. D. 1954.

General No. 9911 | Agenda No. 8.

PAUL HAMMERS,

Plaintiff-Appellant,

vs.

THE BOARD OF FIRE AND POLICE COMMISSIONERS OF THE CITY OF MATTOON, ILLINOIS, a Municipal Corporation,

Defendant-Appellee.

Appeal from the Circuit Court of Coles County.

I.A. 2d 407

REYNOLDS, P. J.

The plaintiff was a policeman in the City of Mattoon, Illinois. On February 4th, 1952, the Board of Fire and Police Commissioners of the City of Mattoon, held a hearing on charges against Hammers and discharged him as such policeman. After such discharge, the plaintiff Hammers filed his complaint in the Circuit Court of Coles County, under the provisions of the Administrative Review Act, asking that the decision of the Board of Fire and Police Commissioners of said City of Mattoon, be reversed and that the plaintiff be restored to his position as a policeman. The defendant board filed its answer together with a transcript of the evidence of the hearing before it, and upon review in the Circuit Court of Coles County, the decision of the Board of Fire and Police Commissioners of the City of Mattoon was upheld. From that decision, the plaintiff appeals to this court.

From the record it seems to be conceded that the City of Mattoon had adopted a Board of Fire and Police Commissioners under the

provisions of Article 14, Sections 1-17 inclusive, of Chapter 24, Illinois Revised Statutes; that the actions of this Board of Fire and Police Commissioners were subject to review under the provisions of the Administrative Review Act; that Hammers was a member of the Police Department of Mattoon and had been such a member for seven years prior to his discharge; that no written charges were preferred against Hammers but he was notified verbally the night before of a hearing before the board at 10:30 A. M. the following day; that he appeared before the board on February 4th, 1952 and a hearing was had and that said board determined to discharge him; and that he petitioned for a rehearing which was denied.

In order to arrive at a decision in this case, it is necessary to examine the Statutes governing. Section 14-11 of Article 14, Chapter 24, Illinois Revised Statutes, insofar as is applicable here, says: "No officer or member of the fire or police department of any municipality subject to this article, who has held that position for more than one year prior to the date this article becomes effective in that municipality, or who has been appointed under the rules and examination provided for by this article, or who was appointed or held his position more than one year prior to the adoption of 'An Act to provide for the appointment of a Board of Fire and Police Commissioners in all cities, villages and incorporated towns in this State having a population of not less than seven thousand, nor more than two hundred thousand, and prescribing the powers and duties of such board', approved April 2, 1903, as amended, shall be removed or discharged except for cause, upon written charges and after an opportunity to be heard in his own defense***."

"All officers and members of either the fire or police department of any municipality holding their positions by virtue of one of the methods specified in paragraph one of this section, are city officers and shall be entitled to the protection afforded by this article."

The first question that must be determined is whether or not the provisions of the statute that requires written charges be filed against a member of the fire or police department, are mandatory. The language of the statute is clear and unambiguous. "No***member of the *** police department *** shall be removed or discharged except for cause, upon written charges, and after an opportunity to be heard in his own defense ***." It is true that Chief Larkin Jones wrote a letter dated February 1, 1952, to M. Glenn Stevens, Chairman of the Board of Fire and Police Commissioners of the City of Mattoon, setting forth the charges upon which officer Hammers was discharged. There is no evidence that Hammers or anyone in his behalf had any knowledge of the contents of this letter or the particular charges against him. The purpose of requiring written charges is that the person against whom the charges are preferred may have an opportunity to defend. If the letter written by Chief Larkin Jones to the chairman of the board had been given to Hammers in reasonable time so that he would have had full knowledge of the offense charged against him and time to prepare any defense he may have had, then the provisions of the statute would have been satisfied. But this was not done. Instead, the officer was notified orally late in the evening of February 3rd, 1952, that he would have a hearing before the board at 10;30 the following morning. This court does not believe that the

statute has been complied with, either in letter or spirit. Unless the statute was complied with, the board lacked jurisdiction to hold the hearing. In Lindblom v. Doherty, 102 Ill. App. 14 at page 30, which was a civil service case, the court there said: "'Specifications of the alleged causes should, therefore, be formulated with such reasonable detail and precision as shall inform the people and the incumbent of what dereliction is urged against him. The charges should be specifically stated with substantial certainty, though the technical nicety required in indictments is not necessary .'"

In the case of Powell v. Bullis, 221 Ill. 379, another civil service case, the language of the statute governing was as follows: "No officer or employee in the classified civil service *** shall be removed or discharged except for cause, upon written charges and after an opportunity to be heard in his own defense". This language is almost identical with that of Section 14-11 of Article 14, Illinois Revised Statutes, governing the removal or discharge of a member of the police department. In the Bullis case there was a question of notice and the court in passing on the matter said: "The giving or waiver of such notice was clearly jurisdictional, (Commissioners of Highways v. Smith, 217 Ill. 250)*** and the record failed to show that Bullis had been notified or waived notice of the time and place of his hearing upon the charges preferred against him, we think the police trial board was without power to hear the charges made against him***".

This position is affirmed in Cartan v. Gregory, 329 Ill. App. 307, at pages 313 and 314, where the court said: "Under Section 12, the jurisdictional prerequisites to the exercise of the power of removal are: (1) cause, (2) written charges, (3) an opportunity to be

heard in his own defense***".

The cases cited are civil service cases but in comparing the language of the statutes governing removal under civil service and under the provisions of Section 14-11 of Article 14, the language used is so closely identical that the intention of the Legislature in enacting the law is clear. Apparently, in enacting the provisions of the Cities and Villages Act, Article 14, Chapter 24, Illinois Revised Statutes, the Legislature intended to give to the members of the police department the same protection afforded under the Civil Service Act. Ashton v. County of Cook, 384 Ill. 287. If that was the intention of the Legislature, then the same law that governs the removal of an officer under the Civil Service Act, would apply here.

The defendant board contends however, that officer Hammers, by his appearance at the hearing, waived the requirements of the statute. We do not think so. He was notified between 11:30 P. M. and midnight of February 3rd, 1952, by the Chairman of the Fire and Police Board to appear the next morning at 10:30 for an investigation before the said board. He appeared and a hearing was had. One witness, Edward Horn, testified at length and then for some undisclosed reason, a letter from Chief Jones to the Chairman of the Police and Fire Board was read into the record and then the evidence of witness Horn continued. The plaintiff was called, sworn and testified. The chairman of the board called him and interrogated him. The plaintiff was not represented by counsel.

In Jacksonville Hotel Bldg. Corp. v. Dunlap Hotel Co., 264 Ill. App. 279 on page 319, it states: "No man can be bound by a waiver of his rights, unless such waiver is distinctly made, with full knowledge of

the rights which he intends to waive; and the fact that he knows his rights and intends to waive them must plainly appear." It further states: "The party claiming a waiver has the burden of proving it. 'A presumption of the relinquishment of a known right cannot be rested on a presumption that such right was known. A waiver must be clearly proved,***' 27 R. C. L., sec. 6, p. 910."

We do not believe officer Hammers intended to waive any of his known rights under the circumstances shown by this record. Therefore, the board was without jurisdiction to discharge him.

Another point worth mentioning is that Hammers stated he had volunteered his services, his car and his own gasoline on the evening in question. This is not denied by any testimony in the record. Whether or not this would relieve him of any duty to stay on the job until relieved, we are not prepared to say.

In the view we take of the jurisdictional question, it is unnecessary to pass on the question of the weight of the evidence, but we can't refrain from mentioning that most all of the witnesses who testified, made better witnesses for the plaintiff than for the defendant.

For the reasons heretofore stated, the cause is reversed.

Reversed.

Abstract

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT.

February Term, A. D. 1954.

A 3773

General No. 9920

Agenda No. 17.

ROBERT G. ALLEN,

Plaintiff-Appellee,

Vs.

EARL BYERS,

Defendant-Appellant.

Appeal from the Circuit Court of McDonough County.

1 I.A.2d 422

REYNOLDS, P. J.

This is an appeal from a judgment rendered in the Circuit Court of McDonough County, in favor of Robert G. Allen and against Earl Byers, in the amount of $10,000.00 for injuries sustained by the plaintiff in a collision between the truck of the plaintiff and the truck of the defendant on May 20th, 1952, on Illinois Route No. 67. Both trucks were proceeding north and Byers turned to the left and Allen hit his truck, causing injuries to Allen. There is conflicting testimony as to whether or not the plaintiff used his horn and whether or not Byers signaled for the turn. Allen sustained a broken patella or knee cap and other injuries.

The defendant assigns as error, first that the court admitted evidence with reference to insurance by the defendant which had a tendency to inflame and prejudice the jury. In support of this, defendant cites the case of Kelly v. Call, 324 Ill. App. 143. In that case, defendant's counsel continued to press the witness to tell everything that had been said and the court admonished the witness to repeat

everything that had been said and at that time the witness mentioned insurance. The court in that case held that the answer thus elicited by the defendant on cross examination did not constitute prejudicial error.

It is a recognized rule of law in this State that when the fact of insurance is elicited or disclosed by the defendant or his counsel, he will not be allowed to take advantage of the situation to procure a new trial or a reversal on the grounds of prejudice. The defendant also cites the case of Williams v. Matlin, 328 Ill. App. 645. In that case, on cross examination of plaintiff's husband, the defendant submitted to him a statement prepared by an investigator, for the purpose of impeaching the witness. On redirect examination, in answer to question by plaintiff's counsel as to who wrote the statement, the witness replied that it was written by one of the men representing the Chicago Motor Club. Defendant objected that this was an improper injection of the insurance company into the case. This objection was held not tenable, the court saying: "Here the defendant sought to take advantage of an alleged impeaching statement signed by plaintiff's witness but prepared and obtained by an agent of the insurer. The identity of the person preparing the statement, the nature of his employment and by whom employed became material for the purpose of showing his interest, if any, in the litigation."

In this case, there is no such persistent questioning by plaintiff's counsel, as to elicit any statement about insurance. The counsel for plaintiff had asked if the defendant had been to see the plaintiff. He stated that he called at the hospital the second day after the accident and talked with the plaintiff's wife. He was asked

what the conversation was between them. Then he was asked this specific question: "I'll ask you whether or not at that time and place you didn't say to Mrs. Allen, 'I want to do what's right?' and the witness, the defendant, in an answer not responsive to the question in any way, said: "I said: 'I've turned my claim in to the State and I've already turned it over to the company, and I said, now it'll be up to them. Whatever is right will be right' something in that regard is all I said. I couldn't find out anything much so I come on back home." Here was no attempt to harass the witness, no persistent questioning that might divulge the insurance on the defendant's truck, but a volunteer answer made by the defendant himself, that was not responsive to the question asked. The answer might have been "yes" or "no". The record fails to disclose that the defendant at any time objected to this testimony, moved for a mistrial or in any way objected to the statement made by the defendant as to insurance. In fact, insurance was not mentioned, but the witness mentioned "the company". When no objection is made at the trial, it cannot be objected to on appeal. People v. Carson, 341 Ill. 11. In re Estate of Fisher, 409 Ill. 420. There is no merit in this contention on the part of the defendant.

Secondly, the defendant assigns as error the refusal of the trial court to give or submit the special interrogatory which was submitted with the motion, on the same sheet of paper. This, the court refused to do on the ground that the motion and special interrogatory were presented as one instrument. This motion and special interrogatory were submitted to the court after the arguments to the jury. The defendant cites Illinois Revised Statutes, Chapter 110, Section 189. This section provides: "In any case in which the jury render a general

verdict, they may be required by the court, and must be required on request of any party to the action, to find specially upon any material question or questions of fact which shall be stated to them in writing, which questions of fact shall be submitted by the party requesting the same to the adverse party before the commencement of the argument to the jury***". Here, the record shows that this special interrogatory was submitted after the arguments to the jury. Under the old practice it was too late after arguments to the jury to submit special interrogatories. Masters v. Wagenseller, 158 Ill. App. 49; Chicago City Ry. Co. v. Jordan, 215 Ill. 390. In the latter case, the reason given is that it gives the other party the chance to submit their own interrogatories or direct their arguments against the ones submitted. While it is true that these cases were long before the present Practice Act was adopted and were interpretive of the old Practice Act of 1907, we think the law then, in view of the wording of the Practice Act of today, is still the law. The submission of the special interrogatory came too late. It is true that the trial court could have called the counsel for the defendant to the bench and told him his reasons for refusing the interrogatory. However this was not required and since the submission came too late, it is not important at this time.

The third and fourth errors assigned, namely that the motion for a new trial should have been allowed because of the weight of the evidence and that the verdict is excessive are questions of fact and will be considered together. The questions of whose negligence caused the accident; whether or not there was contributory negligence; the extent of the damage or injuries and the amount of damages are all

peculiarly questions of fact to be determined by the jury. This court has repeatedly held that where disputed questions of fact are presented to a jury and the jury passes upon them, unless palpably erroneous, the findings of fact by the jury will not be disturbed by the reviewing court. Luris V. Newhall, 333 Ill. App. 173; Hubele v. Baldwin, 332 Ill. App. 330.

We find no reversible error in the record and the judgment is affirmed.

Affirmed.

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT.

3928 A

Abstract

February Term, A. D. 1954

General No. 9899

Agenda No. 1

People of the State of Illinois, Plaintiff-Defendant in Error,	)	
vs.	)	Error to County Court of Adams County
Walter Carter, Jr., Defendant-Plaintiff in Error.	)	

1 I.A.2d 422

CARROLL, J.

Walter Carter, Jr., plaintiff in error, (hereinafter referred to as defendant) was adjudged guilty of contempt of court by the County Court of Adams County and sentenced to the county jail for six months. A writ of error brings the record here for review.

It is the contention of the defendant that the Order of the County Court fails to contain a recital of the facts constituting the offense sufficiently certain and complete to enable a reviewing court to determine therefrom whether or not the conduct of the defendant amounted to direct contempt.

The findings of fact by the trial court as the same appear in its Order are as follows: "It appearing to the Court that Walter D. Carter, Jr., did on Dec. 19, 1952, in the County Court Room of Adams County, Illinois, at the conclusion of the prosecution of said Walter D. Carter, Jr., et al., for riot and while the jury were still in the jury box immediately following the rendering of a guilty verdict and polling by defense counsel

of the jury and while the presiding Judge was sitting on the bench discussing with defense counsel and the State's Attorney the matter of bond for defendants, call Anna Tillquist one of the jurors in said cause a son of a bitch thus putting said juror in fear, and tending to embarrass and obstruct the court in the administration of justice and the Court being fully informed in the premises and the contemnor being now present in open Court."

Since the defendant does not argue that his conduct in using vile and obscene language under the circumstances detailed in the Order did not constitute contempt, this Court's consideration of the record before it is properly limited to determining whether such conduct amounted to a direct contempt for which the defendant could be punished summarily. A direct contempt is one which takes place in the very presence of the Judge, rendering all of the elements of the offense matters within his own personal knowledge. People v. Harrison, 403 Ill. 320; People v. Sherwin, 353 Ill. 525. This definition has been held, however, to embrace contempts committed out of the actual physical presence of the Judge but in any place set apart for use by any constituent part of the Court during a session thereof. It also includes any conduct constituting contempt in the presence of any one of the intregal parts of the Court while engaged in the business devolved upon it by law. 12 Am. Jur. 392; People v. Cochrane, 307 Ill. 126. People v. Andelman, 346 Ill. 149. It has also been held in such cases that the Judge is justified in hearing evidence to establish the direct contempt. People v. Cochrane, supra.

Defendant contends that the Order of the trial court is deficient in failing to recite that the matters therein stated were within the personal knowledge of the Judge. This contention is apparently based upon the premise that direct contempt is limited to that conduct which is personally observed by the Judge, regardless of how seriously it may tend to embarrass or hinder the Court in the administration of justice. Obviously there can be no such limitation for the reason that if the contempt, whether it consists of actions or words, is committed in the presence of the Court, it must be said to be within the personal knowledge of said Court, including the presiding Judge thereof.

Our Supreme Court has consistently held that contempts committed in the presence of the Court, or any constituent part thereof, are direct and criminal in their nature, and punishment therefor may be inflicted summarily. People v. Hagopian, 408 Ill. 618; People v. Sherwin, supra; People v. Howarth, 415 Ill. 499; People v. Rockola, 346 Ill. 27; People v. Pomeroy, 405 Ill. 175; People v. Harrison, supra. In People v. Cochrane, supra, the Court, in speaking of what is meant by presence of the Court, said: "Presence of the Court means in the ocular view of the Court or where the Court has direct knowledge of the contempt."

In the instant case, the committment order definitely states that while the County Court of Adams County was in session, and while the presiding Judge thereof was conducting the business of said Court, the defendant, who was on trial in said Court,

applied the name son of a bitch to a juror, who was then in the jury box and serving as a member of a jury in said Court. Under such recital of facts, there would seem to be no room for doubting that the contempt with which the defendant is charged was committed within the view of the Court.

The defendant has cited, as supporting his argument for reversal of the committment order, the cases of Provenzale v. Provenzale, 339 Ill. App. 345; People, ex rel. v. McKee, 338 Ill. App. 654; People v. Harrington, 301 Ill. App. 185; and People ex rel. v. Butwill, 312 Ill. App. 218. Upon examination of these cases, it appears that the Court's ruling in each instance rested upon the fact that one or more of the necessary elements of direct contempt were lacking in the trial court's order. These authorities do not sustain defendant's position herein, since there is no similar lack of the essential elements of direct contempt in the Order now before this Court.

Upon due consideration of the trial court's order, it is the opinion of this Court that such order contains all necessary elements of direct contempt.

Therefore, the judgment of the County Court of Adams County is affirmed.

Affirmed.

Mr. Justice Hibbs took no part in the consideration or decision of this case.

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT.

3,937 A

Abstract

February Term, A. D. 1954

General No. 9910 Agenda No. 7

Ray Evans, Plaintiff-Cross-Defendant-Appellee,	)	
vs.	)	Appeal from Circuit Court of Montgomery County
Frank L. McDavid, Administrator De Bonis Non of the Estate of Tony Shatas, Jr., deceased, Defendant-Cross-Plaintiff-Appellant.	)	

1 I.A.2d 423

CARROLL, J.

Plaintiff, Ray Evans, brought suit against the administrator of the estate of Tony Shatas, Jr., deceased, to recover damages for personal injuries and property damage sustained by him as the result of a collision between his truck and a passenger automobile owned and operated by the defendant's intestate.

The amended Complaint in substance alleged that on June 15, 1951, the plaintiff was driving his Ford truck on a blacktop road in a northerly direction; that he was driving on the east side of said road and was exercising due care; that defendant's intestate at said time and place was driving a Mercury automobile in a southerly direction; that defendant's intestate then and there negligently and in violation of certain provisions of the Uniform Traffic Act, ran his said automobile across the center line of said road into plaintiff's traffic lane

and into his truck, and that as a result of the negligence of defendant's intestate the plaintiff sustained personal injuries and his truck was damaged.

The defendant filed a Counter-Claim for damages on behalf of his intestate's next of kin and for damage to the automobile of the decedent.

There was a trial by jury, resulting in a verdict for plaintiff in the sum of $3,000.00 and against the defendant on his Counter-Claim.

Motions for judgment notwithstanding the verdict and for a new trial were heard and denied. From the judgment of the trial court entered on the verdicts, defendant brings this appeal.

No questions have been raised on the pleadings or as to the accuracy of the instructions given to the jury. The grounds for reversal urged by defendant are that the trial court erred in denying his motions for a directed verdict, for judgment notwithstanding the verdict and for a new trial.

Defendant's motions for a directed verdict and for judgment notwithstanding the verdict presented to the trial court one and the same question. In passing upon such motions the Court was called upon to decide whether, when all of the evidence is considered, together with all reasonable inferences which may be drawn from it in its aspect most favorable to the plaintiff, there is a complete lack of evidence fairly tending to prove any necessary element of the plaintiff's case. Merlo v. Public Service Co., 381 Ill. 300.

Determination as to the correctness of the trial court's ruling upon these motions requires consideration of the evidence. If from such consideration there appears to be evidence in the record which standing alone tends to prove the material allegations of the Complaint, then such motions were properly denied. Weinstein v. Metro. Life Ins. Co., 389 Ill. 571.

It is contended by the defendant that plaintiff's evidence does not tend to prove that the collision was caused by the negligence of defendant's intestate in driving his car across the center line of the road into the traffic lane of plaintiff, and fails to show that the plaintiff was exercising due care at and immediately prior to the collision.

From the record, it does not appear to be disputed that the collision occurred at about 7 o'clock p.m. on what is known as the Nokomis-Fillmore Road, which is a blacktop hard surface highway, at a point about one and one-half miles south of Nokomis, Illinois; that plaintiff was driving north in a Ford truck, on which there was a stake body or rack; that it was equipped with dual rear wheels; that the truck was partially loaded with cattle and hogs; that the decedent was proceeding south in a Mercury sedan, which was dark blue in color; that the road at the point of the collision is 18 to 20 feet in width and slightly crowned; that after the collision the Shates car was on the east side of the road facing west, and that the plaintiff's truck was on the west side of the road facing north.

John Tickus, a witness who was at the scene immediately

following the collision, testified that the Shatas car was on the east side of the road facing west; that a door of the car was about 100 feet north of the car on the east side of the road; that he saw an arm lying on the east side of the road 50 or 75 feet north of the Shatas car. Robert Bliss, who took pictures of the scene the morning following the collision, testified that at that time there was a gouged out area in the pavement slightly to the east side of the middle of the highway. That there was a blue discolcration which appeared to be blue paint in the gouged out area; and that there was an oil mark, blood and human flesh to the right or east side of the pavement. Mervin Johnson, garageman who moved the vehicles from the scene, testified that he found the Ford truck in the ditch on the west side of the road and the Shatas car headed west in the ditch on the east side of the road; that he noticed tire marks made by both the truck and the Shatas car; that the following morning he made a careful inspection of marks on the pavement; that there was an oil spot and tire marks on the east side of the highway, which the witness pointed out on a photograph of the scene; that he traced the tire marks from the spot on the east side of the highway to where the Shatas car was in the ditch. The plaintiff was permitted to testify that prior to the accident he had been driving on the east side of the highway.

Photographs of the highway and the two vehicles involved, taken the morning following the accident, were introduced in evidence. These photographs show the various spots on the east side of the highway and the marks leading to the cars as described

following the collision, Detective Hall had his Chevrolet car was on the east side of the road facing west; that a distance of one car was about 100 feet north of the car on the east side of the road; that he was no more sober on the night of the 22nd of October than any other night; that he was sober; that he had not been drinking; that he was in the vicinity of the Chevrolet car at the time of the collision, testified that at that time there was a second car that in the direction toward the east side of the middle of the roadway. That there was a blue discolouration which appeared to be blue paint in the vertical one drawn and that there was no dirt, stone and loose rock to the right of the east side of the centerline. Martin Johnson, questioned who owned the vehicles from the scene, testified that he found the Ford truck to the ditch on the west side of the road and the Chevrolet car backed over in the ditch on the east side of the road; that he noticed the vehicle, the Chevrolet and the Ford car; that the lighting circuit in both a normal inspection of marks on the pavement; that there was no dirt and rock scattered on the east side of the roadway. Only the tracks marked one on a photograph of the roadway; that he found the tracks from the east to the west side of the roadway to where the Ford car was in the ditch. The witness testified in length that structure the evidence he had been taking on the east side of the roadway.

Photographs of the scenery and the two vehicles involved, taken the morning following the accident, were introduced in evidence. These photographs show the various parts of the east side of the highway and the middle and the middle leading to the east on the

by the witnesses, and also the extent and character of the damage to the two vehicles.

The foregoing testimony as to the circumstances existing immediately following the collision and the photographs must be said to constitute circumstantial evidence from which the jury could reasonably proceed to a determination of the questions of plaintiff's due care and the negligence of defendant's intestate.

This evidence tends to prove that the collision occurred in the plaintiff's lane of traffic. The location of the Shatas car following the accident, the tire marks and spots on the highway, together with the evidence of the damage to the two vehicles, do not permit any other conclusion. These circumstances are evidence going to prove that at the time of the collision the plaintiff's truck was being driven on his proper side of the highway, and that the Shatas car had been driven across the center line and into plaintiff's traffic lane. The plaintiff was not required to prove by direct and positive testimony that he was in the exercise of due care. Proof of facts and circumstances from which this might be reasonably inferred sufficiently met all that was required of him as to that element of his case. Likewise, the negligence of defendant's intestate could be established by circumstantial evidence. Ruspatini v. Steffek, 414 Ill. 70; Devine v. Delano, ~~270~~ 272 Ill. ~~207~~ 166.

Upon careful consideration of all the evidence in the record in this case, this Court is of the opinion that the issues of the negligence of defendant's intestate and the contributory negligence of plaintiff were properly submitted to the jury.

Defendant's argument that the trial court erred in denying a motion for a new trial cannot be sustained unless it appears that the verdict of the jury was against the manifest weight of the evidence. An examination of the record clearly indicates that the jury's verdict is amply supported by the evidence. In such situation substitution of this Court's judgment on the facts for that of the jury is not permitted. Bliss v. Knapp, 331 Ill. App. 45.

Therefore, the judgment of the Circuit Court of Montgomery County is affirmed.

Affirmed.

Mr. Justice Hibbs took no part in the consideration or decision of this case.

Abstract

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT.

3943 A

February Term, A. D. 1954

General No. 9913 Agenda No. 10

W. L. Strubinger, Administrator of the Estate of Richard E. Baker, deceased, Plaintiff-Appellant,	)	
vs.	)	Appeal from Circuit Court of Pike County
Dick Coultas and Albert Coultas, doing business as Coultas Brothers, and Eugene Norton, Defendants-Appellees.	)	

CARROLL, J.

1 I.A.2d 42

This is an action brought under the Injuries Act, (Illinois Revised Statutes, 1953, Chapter 70), to recover for the alleged wrongful death of plaintiff's intestate. At the conclusion of plaintiff's evidence, the Court instructed the jury to return a verdict for the defendants. Plaintiff appeals from the judgment entered upon such verdict, urging that the trial court erred in directing the same.

Since no question is raised on the pleadings, it is unnecessary to refer to them beyond observing that the defendants' negligence and the exercise of due care by plaintiff's intestate, were appropriately alleged in the Complaint.

The facts which do not appear to be disputed are as follows: On April 17, 1952, plaintiff's intestate, Richard E.

Baker, was driving his 1947 Ford automobile in a northwesterly direction on what is known as State Route 96. The weather was clear and the pavement was dry. A truck, on which the left rear tire had blown, was stopped on the right shoulder of said highway about two miles northwest of New Canton in Pike County. Jack and Donny Pickett and Glenn Garrett were in or about the said truck. A few minutes after this truck stopped, the decedent, coming from New Canton, where he operated a garage and service station, drove up and stopped his car on the right shoulder of the road 50 or 60 feet in front of the truck. Garrett and Jack Pickett got into the front seat of decedent's car, with Garrett sitting next to decedent. After some conversation with his passengers, decedent drove his car from the shoulder onto the road. Within a matter of seconds, there was a collision between it and defendants' truck, which was being driven northwesterly on State Route 96. Plaintiff's intestate was thrown from his car to the highway and was killed.

Recovery by the plaintiff in this case could be had only upon proof that decedent was in the exercise of due care and caution for his safety at the time of the occurrence, and that the injuries resulting in his death were proximately caused by the negligence of the defendants as charged in the Complaint.

The defendants' motion for a directed verdict presents the single question whether plaintiff's evidence, taken to be true and appraised in the aspects most favorable to the plaintiff, together with all reasonable inferences to be drawn therefrom, fairly tended to prove the material elements of plaintiff's

case. Merlo v. Public Service Co., 381 Ill. 300; Lindroth v. Walgreen Co., 407 Ill. 121.

In determining the question of law thus raised by such motion, the evidence in the record must be reviewed in order to ascertain whether in fact there is any evidence tending to prove the defendants' negligence and the exercise of due care by the decedent.

Glenn Garrett, who was the only eye witness testifying, testified that he and Jack Pickett got into the front seat of the Baker car; that he sat next to the decedent; that decedent was crippled, having something wrong with his back; that the motor of the car was then idling; that decedent mentioned something about a tire and wheel; that he asked the witness and Pickett if they would be interested in buying one; and that Pickett said "Yes." The witness was then asked this question: "Q. Then what was said? A. The next thing he said I don't know if I still have it or not, and then pulled out, and that was all." He further testified that it was a matter of seconds from the time decedent started the car until the crash occurred; that he did not know where the Baker car was with reference to the pavement when it was struck; that he did not hear or see anything coming before the Baker car was struck; that he did not remember seeing the Coultas truck before the accident; that he did not remember seeing the decedent look back prior to pulling his car onto the road or seeing him open the left side door; and that he had no recollection of events occurring from

the time of the collision until some time later. The witness Lierle testified that he saw the Coultas truck on the road prior to the accident; that it was travelling fast, because the motor was noisy and it went by in a matter of seconds. The witness Hart testified that the Coultas truck passed him at a point one mile south of the point of the collision, and was travelling 60 or 70 miles per hour. Donald Loyd, a state highway policeman, testified that he arrived at the scene shortly after the accident; that the Baker car was in the west traffic lane at a right angle with the highway; that the Coultas truck was facing north 175 feet north of the car and in the east traffic lane; and that he saw tire marks extending northwesterly from the east traffic lane. This witness did not connect these tire marks in any way with either of the two vehicles involved.

From photographs in evidence and the testimony of the witness, Paul Windley, it appears that decedent had a clear and unobstructed view of the highway to his rear for a distance of at least 800 feet. Jerome Baker, brother of the decedent, testified that because of a back ailment, the decedent always opened the door and looked out "when he drove up." A number of photographs showing damage to both of the vehicles were introduced in evidence. These photographs show the left side of the Baker car badly damaged.

The foregoing is substantially all of the evidence in the record bearing upon the circumstances surrounding the accident in question.

The plaintiff was required to affirmatively show by

evidence that his intestate was in the exercise of due care as alleged in the complaint. Crawford v. Cahelan, 259 Ill. App. 14; Morgan v. Rockford B. & J. Ry. Co., 251 Ill. App. 127; Mo. Chi. St. R. R. Co. v. Cossar, 203 Ill. 608. It therefore became plaintiff's burden to show what the decedent did at the time of and just prior to the accident by way of exercising due care for his own safety. From the testimony of the witness Garrett, which must be taken to be true, it appears that the decedent did nothing prior to pulling his car onto the highway to learn whether he might do so with safety. There is no evidence that he stopped just prior to entering the north bound traffic lane and looked to the south, and had he done so, he would have seen the Coultas truck approaching. This conclusion is inescapable, since the evidence is that the collision occurred within seconds after decedent's car started to move. The proof that the decedent's car was idling and that decedent was engaged in conversation concerning the tire and wheel seem to reasonably support the conclusion that the decedent carelessly pulled his car onto the highway without taking the precautions which an ordinarily prudent person would have observed under the existing circumstances.

Plaintiff argues that ordinary care on the part of the decedent might be inferred from circumstances in evidence, such as his character and habits, and the further fact that it was shown that decedent made a practice of opening the left door instead of looking out the left front window. Such argument overlocks the fact that in this case an actual eye witness testified as to the occurrence. Recognition is given to the general rule

that the question of contributory negligence is ordinarily one of fact for the jury. Thomas v. Buchanan, 357 Ill. 270. However, where there is an absence of evidence tending to show due care, there can be no disagreement among reasonable minds in reaching a conclusion that such material element of the case was not proven.

Upon careful consideration of all the evidence in the record in this case, it is the opinion of this Court that the action of the trial court in directing a verdict for the defendant was correct. Therefore, the judgment of the trial court is affirmed.

Affirmed.

Mr. Justice Hibbs took no part in the consideration or decision of this case.

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